

# U.K. Regulatory Revision—A New Blueprint for Reform

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## Abstract

*A number of important regulatory reforms have been taken forward in the United Kingdom following the global financial crisis, which began with the tightening of credit conditions in interbank markets in autumn 2007 and the following devastating collapses in summer 2008 in the United States, United Kingdom, and elsewhere. A series of key initiatives were adopted by the outgoing Labour Administration in the United Kingdom before the General Election in May 2010.<sup>1</sup> These have since been followed by more fundamental institutional reforms, and further proposed structural revision, by the new Coalition Conservative and Liberal Democrat Government that has since taken office. This includes amendment of the underlying statutory basis for U.K. financial regulation and replacement of the former single-integrated authority with a new central bank based macro-prudential and split-conduct-of-business model. A number of other important connected financial policies have also been continued, or newly created, over the last two years. All of this creates an important new blueprint for regulatory reform for possible consideration and adoption in other countries or other policy reform discussions.*

## Introduction

Her Majesty's Treasury in the United Kingdom published the Draft Financial Services Bill on January 26, 2012, which will significantly restructure financial regulation for de-

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1. For comment on the earlier post-crisis reforms adopted, see George A. Walker, *Financial Crisis—U.K. Policy and Regulatory Response*, 44 INT'L LAW. 751 (2010).

cedes to come.<sup>2</sup> This followed an earlier period of pre-legislative scrutiny between July and December 2011.<sup>3</sup> The Bill provides for substantial institutional reform of the current single-integrated regulatory approach that was established under the Financial Services and Markets Act (FSMA) 2000.

Following the General Election in May 2010, the new Coalition Conservative and Liberal Democrat Government has confirmed that it will rebuild financial regulation around the Bank of England. The former Financial Services Authority (FSA) is to be abandoned and core prudential regulation is to be transferred to a new subsidiary of the Bank, the Prudential Regulatory Authority (PRA), with conduct of business and markets being transferred to a separate Financial Conduct Authority (FCA). A new Financial Policy Committee (FPC) will be set up within the Bank to carry out macro-prudential oversight of the U.K. financial system. The Bank of England will then become directly responsible for monetary policy, regulatory policy, and wider financial system oversight, as well as payments systems and financial infrastructure, under a new central bank based macro-prudential model.

The changes were originally announced by the Chancellor of the Exchequer at his Mansion House Address on June 16, 2010,<sup>4</sup> with further details being provided in Parliament by the Financial Secretary Mark Hoban on June 17, 2010. Consultation documents were issued by the Treasury in July 2010 and February 2011 and then again in June 2011.<sup>5</sup> These explained the basis for the changes and outlined the structure of the new institutional system to be created. The reforms have been examined by a Joint Parliamentary Select Committee on the Draft Bill Report, with the nature and function of the new institutional structure being considered by a separate Parliamentary Treasury Select Committee (TSC). Both Committees took evidence and held a number of hearings on the proposed reforms. The Joint Select Committee released its report on December 19, 2011, with the TSC having published an initial report at the end of January 2011 and further comment papers on other specific issues following.<sup>6</sup>

The Chancellor of the Exchequer, under the Coalition Government, had established a separate Independent Commission on Banking (ICB) to make recommendations to strengthen the U.K. banking system and to promote competition following the financial crisis in the United Kingdom during 2008-2009. The ICB published an Interim Report

2. Financial Services Bill, 2010-12, H.C. Bill [278] (U.K.); HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: SECURING STABILITY, PROTECTING CONSUMERS, 2012, Cm. 8268 (U.K.); Financial Services Bill Explanatory Notes, 2010-12, H.C. Bill [278—EN] (U.K.). See also Press Release, HM Treasury, Government Publishes Financial Services Bill (Jan. 17, 2012) (on file with author).

3. See HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: THE BLUEPRINT FOR REFORM, 2011, Cm. 8083, at 51-365 (U.K.).

4. See Hon. George Osborne, Chancellor of the Exchequer, HM Treasury, Speech at The Lord Mayor's Dinner for Bankers & Merchants at Mansion House (June 16, 2010).

5. BLUEPRINT FOR REFORM, *supra* note 3; HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: BUILDING A STRONGER SYSTEM, 2011, Cm. 8012 (U.K.); HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: JUDGEMENT, FOCUS AND STABILITY, 2010, Cm. 7874 (U.K.).

6. JOINT COMMITTEE ON THE DRAFT FINANCIAL SERVICES BILL, DRAFT FINANCIAL SERVICES BILL, 2010-12, H.L. 236, H.C. 1447 (U.K.); TREASURY COMMITTEE, FINANCIAL REGULATION: A PRELIMINARY CONSIDERATION OF THE GOVERNMENT'S PROPOSALS, 2010-11, H.C. 430-I (U.K.). For continuing work of the TSC, see the Committee's website at <http://www.parliament.uk/treascom/>.

on April 11, 2011 following an earlier issues paper.<sup>7</sup> A final paper was released in September 2011.<sup>8</sup> The ICB recommended the establishment of a structural “retail ring-fence” within the largest U.K. banking groups to insulate household and Small and Medium Enterprise (SME) account facilities from wholesale and investment banking and to impose higher capital and loss absorbing debt limits on the ring-fenced operations. The Government confirmed that it would implement the recommendations of the ICB in full during the current Parliamentary session.

The Coalition Government has also taken forward a number of other reform initiatives. These include converting the earlier Labour Government bank charge into a permanent “Bank Levy.” Earlier bank remuneration reforms are to be continued with a new Code of Conduct that has been incorporated into the FSA’s Handbook of Rules and Guidance issued under the FSMA.<sup>9</sup> The Government has been pressing the major banks to lend to medium and smaller enterprises and households under “Project Merlin,” which finally came into operation in February 2011.<sup>10</sup> This was then terminated in February 2012 and was to be replaced by a new Government “National Loan Guarantee Scheme” that was announced by the Chancellor in his Autumn Statement in November 2011.<sup>11</sup> The Labour Government had also set up the U.K. Financial Investments (UKFI) to hold the Government’s investments in major banks that received capital injections in 2008 and 2009, as well as a separate U.K. Asset Protection Agency (APA) to provide guarantees to major banks holding distressed (toxic) assets following the crisis. The Government had separately pressured the major banks to enter into a “Code of Practice on Taxation” on tax management and avoidance.

The new Coalition Government has accordingly continued or launched a number of important new initiatives in the financial and regulatory area. Many of these are claimed to be necessary following the financial crises that devastated national and international financial markets between 2007 and 2009, although much of it also reflects underlying political ideology and policy. A number of important reforms had already been instituted by the outgoing Labour Administration, which included introducing a new Special Resolution Regime (SRR) for banks and the establishment of a Financial Stability Committee (FSC) within the Bank of England under the Banking Act 2009 with the creation of a separate inter-agency Council for Financial Stability (CFS) to coordinate macro-prudential oversight in the United Kingdom.<sup>12</sup> The further post-election reforms announced continue a substantial part of the earlier regime and revisions, although within a more centralized and strengthened central bank based institutional model.

The purpose of this paper is to examine the nature and content of the Coalition Government’s recent reform program. The policy basis for the revisions is examined with

7. INDEP. COMM’N ON BANKING, INTERIM REPORT, CONSULTATION ON REFORM OPTIONS (2011) (U.K.); HM TREASURY, INDEP. COMM’N ON BANKING, ISSUES PAPER, CALL FOR EVIDENCE (2010) (U.K.).

8. INDEP. COMM’N ON BANKING, FINAL REPORT, RECOMMENDATIONS (2011) (U.K.); INTERIM REPORT, *supra* note 7.

9. See FSA, FSA HANDBOOK ch. 19A (2011) (U.K.), available at <http://fsahandbook.info/FSA/html/handbook/SYSC/19A>.

10. Press Release, HM Treasury, Project Merlin – Government Statement (Feb. 9, 2011), available at [http://www.hm-treasury.gov.uk/d/gov\\_agreement\\_090211.pdf](http://www.hm-treasury.gov.uk/d/gov_agreement_090211.pdf).

11. Press Release, HM Treasury, National Loan Guarantee Scheme (Dec. 6, 2011) (on file with author); see also HM TREASURY, AUTUMN STATEMENT 2011, 2011, Cm. 8231, ¶¶ 1.115, 2.39 (U.K.).

12. See generally Walker, *supra* note 1 (discussing the earlier Labour Administration reforms).

reference to the earlier consultation documents in July 2010, February 2011, and June 2011. The structure and content of the Draft Financial Services Bill and emerging shape of the new institutional regulatory structure in the United Kingdom are then examined in further detail. Some of the early comments made by the Treasury Select Committee on financial regulation are noted with the principal recommendations of the Joint Committee Report on the Financial Services Bill. The proposed function and operations of the PRA and FCA are reviewed separately. The principal reform suggestions of the ICB in its Interim and Final Reports in April and September 2011 are referenced. The Government's other initiatives—with regard to remuneration, bank levy, bank lending, asset holdings and guarantees, and taxation—are also reviewed. Provisional comments and conclusions are drawn with regard to the significance, value, and effectiveness of the new regulatory model being constructed in the United Kingdom at this time.

## I. A New Approach to Financial Regulation and Building a Stronger System

The new regulatory regime to be set up in the United Kingdom was initially announced by the Chancellor of the Exchequer during his Mansion House speech on June 16, 2010, and the Treasury subsequently issued a formal consultation document titled *A New Approach to Financial Regulation* on July 2010.<sup>13</sup> The paper outlined the causes of the financial crisis<sup>14</sup> and argued for the need for reform over the earlier tripartite regulatory model that had been set up under the integrated regulatory structure adopted by the outgoing Labour Administration under the FSMA 2000. The paper stressed the need to establish a new macro-prudential regulation regime and the need for the separation of prudential from consumer protection and market regulation. The enhanced role of the Bank of England was outlined with the role and function of the proposed FPC, PRA, and a Consumer Protection and Markets Authority (CPMA), which was subsequently renamed to create the FCA.<sup>15</sup> The paper also commented on markets and infrastructure, crisis management, and implementation.<sup>16</sup>

The Government accepted the complexity of the changes proposed with further consultation documents to be issued in February and June 2011, which included draft legislation on the main parts of the proposed Reform Bill. Appropriate transitional arrangements were to be adopted. These included reorganizing the FSA with a "shadow" internal structure being set up to allocate FSA staff and responsibilities between the PRA and FCA on a provisional basis.<sup>17</sup> An interim FPC would be set up within the Bank of England by autumn 2010 to carry out preparatory work and to discharge a provisional macro-prudential function. This would replace the earlier CFS. A number of principles were to guide the

13. JUDGEMENT, FOCUS AND STABILITY, *supra* note 5.

14. The fundamental causes of the crisis are summarized in terms of: (a) global economic imbalances; (b) mispriced and misunderstood risks; (c) unsustainable funding and business models for banks; (d) excessive build-up of debt across the financial system; and (e) growth of an unregulated "shadow banking" system. *Id.* ¶ 2.

15. *Id.* at 9-40.

16. *Id.* at 41-56.

17. The FSA would also prepare a new operating model, to be agreed upon before the end of 2010, dealing with structure, resource, and risk-based supervision within the PRA and CPMA with the Bank being represented on the internal working committees. *Id.* ¶ 7.9.

transitional measures adopted.<sup>18</sup> The July 2010 Green Paper set out the general outline of the new arrangements, although a number of more detailed matters would have to be confirmed over time.

The Coalition Government published a follow-up consultation paper in February 2011 titled *A New Approach to Financial Regulation: Building a Stronger System*.<sup>19</sup> The Treasury Select Committee had also published its report on U.K. financial reform, *Financial Regulation: A Preliminary Consideration of the Government's Proposals*, on February 3, 2011.<sup>20</sup> The Treasury issued its views on the consultation responses received in November 2010, which were claimed to have generally supported the move to strengthen financial stability and macro-prudential regulation.<sup>21</sup> The Government identified five key themes following the initial consultation process. The new regulatory authorities' core statutory objectives had to be balanced and supplemented by other factors. The accountability and transparency had to be ensured of the PRA, the FCA, and the FPC. The FCA had to discharge a strong and coherent market regulation function that included acting as U.K. Listing Authority (UKLA). The authorities had to continue to contribute to the emerging European and international regulatory agenda during the transitional phase and final "steady" state. There had to be effective coordination between the new regulatory authorities.

Consultation on the February 2011 paper was limited to April 14, 2011, with this being justified by the Government in terms of the need to remain within its original legislative timetable. The Report nevertheless acknowledged the Treasury Select Committee's concern that the quality of the legislation could be compromised if the Government pursued its timetable too rigidly.<sup>22</sup> The Government published a White Paper in February 2011 with a draft Bill for pre-legislative scrutiny (PLS) and with a full twelve Parliamentary sitting weeks being provided for scrutiny until December 2011,<sup>23</sup> which would involve convening a separate Joint Scrutiny Committee of the House of Commons and House of Lords to examine the Bill clause by clause. The Government published a further White Paper with accompanying Explanatory Notes in June 2011 with the Draft Financial Services Bill that would amend the FSMA.<sup>24</sup> A number of further consultation questions were raised with the Treasury also commenting on the responses received to the earlier consultation.<sup>25</sup> It was intended that the final draft Bill would be introduced in summer 2011 and receive Royal Assent in summer 2012, although these dates would later have to be pushed back to spring 2012 and 2013, respectively.

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18. These included: (a) maintaining high quality, focused regulation; (b) minimizing uncertainty and transitional costs for firms; (c) balancing implementation with appropriate scrutiny and consultation; and (d) providing as much clarity and certainty as possible for FSA, Bank, and other staff. *Id.* ¶ 7.5.

19. BUILDING A STRONGER SYSTEM, *supra* note 5.

20. A PRELIMINARY CONSIDERATION, *supra* note 6.

21. HM TREASURY: A NEW APPROACH TO FINANCIAL REGULATION: SUMMARY OF CONSULTATION RESPONSES (2010) (U.K.).

22. *Id.* ¶ 8.3.

23. *Id.* ¶¶ 8.5-6.

24. BLUEPRINT FOR REFORM, *supra* note 3, at 51-365.

25. *Id.* at 367-408.

## II. Financial Services Bill

The Draft Financial Services Bill was presented to House of Commons on January 26, 2012.<sup>26</sup> The Bill sets out the new framework for financial regulation in the United Kingdom with responsibility for financial stability being placed with the Bank of England.<sup>27</sup> This was provided for in the Coalition Government's program statement.<sup>28</sup> The Bill sets out the powers, objectives, and principles for each of the new agencies established, including, in particular, the FPC, PRA, and FCA. This involves the transfer of the existing powers from the FSA to the PRA and the FCA, with certain new powers also being provided. Provisions are included to secure accountability of the regulatory agencies with specific provisions on the constitution of their governing bodies. Cooperation is to be secured through the imposition of a statutory duty to coordinate with each other and cooperate with the Bank with further provisions governing the coordination of memberships of European and international bodies. Specific mechanisms are included governing the responsibilities between the Treasury, Bank, PRA, and FCA in the event of a financial crisis.

The Bill is in nine parts and makes amendments to the Bank of England Act 1998 and FSMA 2000. It contains provisions on mutual societies and collaboration between agencies; further measures on inquiries and investigations, complaints against the regulators, and amendments to the Banking Act 2009; and certain other miscellaneous and general matters. The Bill extends to the whole of the United Kingdom and covers matters relating to U.K. financial services and markets with no powers having been delegated to the National Assembly for Wales or Scottish Parliament.

### A. FINANCIAL STABILITY OBJECTIVE AND STRATEGY

A new Deputy Governor of the Bank of England is to be appointed for prudential regulation in addition to the existing Deputy Governors for financial stability and monetary policy.<sup>29</sup> The "Financial Stability Objective" of the Bank is strengthened by amending the language from requiring the Bank to "contribute to protecting and enhancing" to "protect and enhance" financial stability and replacing the earlier reference to "financial systems" by with "financial system."<sup>30</sup> The Court of Directors of the Bank is required to prepare the Bank's "Financial Stability Strategy" following consultation with the FPC and Treasury.<sup>31</sup> The strategy is to be prepared within six months and reviewed every three years subject to FPC recommendations.<sup>32</sup>

26. Financial Services Bill Explanatory Notes, 2010-12, H.C. Bill [278—EN] (U.K.); SECURING STABILITY, PROTECTING CONSUMERS, *supra* note 2; Financial Services Bill Explanatory Notes, *supra* note 2.

27. BLUEPRINT FOR REFORM, *supra* note 3, at 282.

28. HM GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 9 (2010), available at [www.hm.gov.uk/programmeforgovernment](http://www.hm.gov.uk/programmeforgovernment) ("We will reform the regulatory system to avoid a repeat of the financial crisis. We will bring forward proposals to give the Bank of England control of macro-prudential regulation and oversight of macro-prudential regulation.").

29. Financial Services Bill, 2012-13, H.L. Bill [25] cl. 1(2) (U.K.), available at [http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0025/lbill\\_2012-20130025\\_en\\_2.htm#pt1-l1g1](http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0025/lbill_2012-20130025_en_2.htm#pt1-l1g1).

30. *Id.*

31. *Id.* pt. 1, cl. 3(1)(9A).

32. *Id.* pt. 1, cl. 3(1)(9A)(4).

The Bill provides for the establishment of the FPC with twelve members consisting of the Governor, Deputy Governors, Chief Executive of the FCA, two members appointed by the Governor, four members appointed by the Chancellor, and a Treasury representative.<sup>33</sup> The FPC is to contribute to the Bank's achievement of its Finance Stability Objective, in particular, by identifying, monitoring, and taking action to remove or reduce systemic risks to protect and enhance the resilience of the U.K. financial system.<sup>34</sup> A systemic risk is any risk to the stability of the U.K. financial system as a whole or as a significant part.<sup>35</sup> The Treasury may make recommendations to the FPC at any time in writing.<sup>36</sup> Recommendations must be within the first thirty days of the section coming into force and annually.<sup>37</sup> The FPC must confirm whether it accepts the recommendations and the action taken in response.<sup>38</sup>

The functions of the FPC are to monitor the stability of the U.K. financial system, issue directions, make recommendations, and prepare financial stability reports. In carrying out its functions, it is to have regard to the Bank's financial stability strategy and avoid prejudicing the PRA or FCA securing their objectives. The FPC may issue directions to the FCA or PRA on macro-prudential measures<sup>39</sup> or recommendations within the Bank, to the Treasury or FCA and PRA or other persons.<sup>40</sup> The Bank is to publish a record of each meeting of the FPC within six weeks except where this may not be in the public interest.<sup>41</sup> The FPC is to publish biannual Financial Stability Reports.<sup>42</sup> The Governor and Chancellor are to meet following each report with a record of the meeting to be published within six weeks.<sup>43</sup> The Bank may issue a direction to the FCA and PRA requiring specified information (or information of a specified description) or the production of specified documents (or documents of a specified description).<sup>44</sup> The information or documents must reasonably be required in connection with the exercise of its functions with regard to

33. *Id.* pt. 1, cl. 3(1)(9B).

34. *Id.* pt. 1, cl. 3(1)(9C).

35. "This includes risks attributable to structural features of financial markets [or] the distribution of risk within the financial sector and unsustainable levels of leverage, debt or credit growth." *Id.* pt. 1, cl. 3(1)(9C)(3), (5).

36. The recommendations may relate to the FPC's understanding of the Financial Stability Objective, its responsibility with regard to the objective or any other matters that the FPC "should have regard in exercising its functions." *Id.* pt. 1, cl. 3(1)(9D).

37. *Id.* pt. 1, cl. 3(1)(9D)(2).

38. *Id.* pt. 1, cl. 3(1)(9D)(3).

39. The FPC may give directions to the FCA and PRA on macro-prudential measures in relation to a specified class of regulated persons. *Id.* pt. 1, cl. 3(1)(9G)(1). The FCA and PRA must comply with the direction give subject to revocation. *Id.* pt. 1, cls. 3(1)(9H)-(9I). Macro-prudential measures are to be prescribed by the Treasury by order subject to Parliamentary approval by resolution. *Id.* pt. 1, cl. 3(1)(9M).

40. The FPC may make recommendations within the Bank concerning financial assistance to financial institutions or with regard to "payment systems, settlement systems and clearing houses." *Id.* pt. 1, cl. 3(1)(9N). Recommendations may be made to the Treasury in connection with macro-prudential measures, regulated activities, activities subject to regulation by the PRA or FAC, or persons required to provide information by the PRA. *Id.* pt. 1, cl. 3(1)(9O). "The Financial Policy Committee may make recommendations to the FCA and PRA about the exercise of their respective functions," except in connection with specified regulated persons. *Id.* pt. 1, cl. 3(1)(9P). The FPC has a general power to make recommendations to any other persons subject to being made or confirmed in writing. *Id.* pt. 1, cl. 3(1)(9Q).

41. *Id.* pt. 1, cl. 3(1)(9R).

42. *Id.* pt. 1, cl. 3(1)(9T).

43. *Id.* pt. 1, cl. 3(1)(9U).

44. *Id.* pt. 1, cl. 3(1)(9V)(2).

the Financial Stability Objective, including functions under the Banking Act 2009, systemically important market infrastructure, and liquidity support. The Bank must consult with the FCA and PRA in advance and have regard to the principle of proportionality.<sup>45</sup>

Certain other general duties are imposed on the PRA. The FPC is to have regard to the Bank's Financial Stability Strategy in the exercise of its functions.<sup>46</sup> In working with the FCA and the PRA, the FPC is to seek to avoid exercising its functions in a way that would prejudice the advancement of the operational objectives for the PRA.<sup>47</sup> The FPC is also to have regard to the principles of proportionality, disclosure of its views on relevant threats, and international obligations.<sup>48</sup> This reflects some of the general supervisory principles that were retained from the FSMA and applied to the FCA and PRA with amendment.

## B. FSMA

The Bill makes a number of amendments to the FSMA in connection with regulatory authorities, regulated activities, permission requirements, passports, performance, official listing, business transfers, hearings and appeals, rules and guidance, control, recognized investment exchanges and clearing houses, suspension from trading, discipline and enforcement, compensation, Ombudsman, Lloyd's, information, auditors and actuaries, consumer protection and competition, insolvency, and other miscellaneous matters, including on the Consumer Financial Education Body (CFEB), professional parties, international obligations, interpretation, and Parliamentary control of secondary legislation in the form of statutory instruments.<sup>49</sup>

### 1. *Financial Conduct Authority (FCA)*

The FSMA is amended to rename the FSA the FCA.<sup>50</sup> A series of new provisions have been inserted into the FSMA concerning the FCA's general duties, objectives, power to amend objectives and guidance on objectives, supervision, monitoring and enforcement, consultation, and reviews. The general duties of the FCA are defined in terms of securing its objectives and carrying out its general functions.<sup>51</sup> In discharging its general functions, the FCA is to act, insofar as possible, in a way that is compatible with its strategic objective and advances one or more of its operational objectives. The FCA is assigned a separate strategic objective of ensuring that relevant markets function well,<sup>52</sup> with three further operational objectives of consumer protection, integrity, and competition.<sup>53</sup> The FCA is

45. *Id.* pt. 1, cl. 3(1)(9W)(1).

46. *Id.* pt. 1, cl. 3(1)(9E)(1).

47. *Id.* pt. 1, cl. 3(1)(9E)(2).

48. *Id.* pt. 1, cl. 3(1)(9E)(3).

49. *Id.* pt. 2.

50. *Id.* pt. 2, cl. 5.

51. *Id.* pt. 2, cl. 5(1)(1B)(1).

52. This was previously protecting and enhancing confidence in the U.K. financial system under the June 2011 Draft Bill.

53. *Id.* pt. 2, cl. 5(1)(1B)(2)-(3). "The consumer protection objective is: securing an appropriate degree of protection for consumers." *Id.* pt. 2, cl. 5(1)(1C)(1). So doing, the FCA must have regard to differing degrees of investment and transaction risk, consumer experience, needs, individual responsibility, appropriateness, and any CFEB and Ombudsman information disclosure. *Id.* pt. 2, cl. 5(1)(1C)(2). "The integrity objective is:



also to have regard to specified regulatory principles and the importance of limiting financial crime.<sup>54</sup> The general functions of the FCA are defined in terms of making rules, preparing and issuing codes, providing general guidance, and determining general policy principles.<sup>55</sup>

The FCA is to maintain arrangements for supervising authorized persons, to determine compliance, and to take appropriate enforcement action.<sup>56</sup> The FCA is required to make and maintain effective arrangements for consulting with practitioners and consumers. The earlier Practitioner Panel and Smaller Business Practitioner Panel set up under FSMA are given statutory recognition.<sup>57</sup> A new Markets Practitioner Panel to represent the interests of firms and persons affected by the FCA's functions is also to be set up, in addition to the existing Consumer Panel.<sup>58</sup> The FCA must consider the representations made by the panels.<sup>59</sup> The Treasury may appoint an independent review of the economy, efficiency, and effectiveness of the way in which the FCA has used its resources with the person appointed having the right to obtain all necessary documents and information.<sup>60</sup> The constitutional provisions that earlier governed the FSA under Schedule 1 FSMA are amended to apply to the FCA and PRA.<sup>61</sup>

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protecting and enhancing the integrity of the [U.K.] financial system." *Id.* pt. 2, cl. 5(1)(1D)(1). Integrity includes the soundness, stability, and resilience of the financial system; preventing financial crime and market abuse; and ensuring orderly operation and transparency in the price formation process. *Id.* pt. 2, cl. 5(1)(1D)(2). "The competition objective is: promoting effective competition in the interests of consumers in the markets for regulated financial services" and investment exchange services. *Id.* pt. 2, cl. 5(1)(1E)(1). The FCA is to have regard to different consumer needs, changing, entry, and innovation. *Id.* pt. 2, cl. 5(1)(1E)(2). The competition objective was previously a separate "securing efficiency and choice" objective that was to promote efficiency and choice in the market for services (as defined in section 1C(4)) or services provided by a recognized investment exchange. *Id.* pt. 2, cl. 5(1)(1E). Relevant markets and consumer are separately defined with other interpretation provisions. *Id.* pt. 2, cls. 5(1)(1F)-(1I). The U.K. financial system "includes financial markets and exchanges, regulated activities and other activities connected with financial markets and exchanges." *Id.* pt. 2, cl. 5(1)(1I). The Treasury may amend the objectives with guidance issued under section 139A to require the FSMA to include FCA guidance on how it will secure its operational objectives. *Id.* pt. 2, cls. 5(1)(1J)-(1K).

54. *Id.* pt. 2, cl. 5(1)(1B)(5). The regulatory principles to be applied by both the FCA and PRA consist of: (a) resource efficiency; (b) proportionality; (c) consumer responsibility; (d) management responsibility; (e) disclosure; and (f) transparency.

55. *Id.* pt. 2, cl. 5(1)(1B)(6).

56. *Id.* pt. 2, cl. 5(1)(1L).

57. *Id.* pt. 2, cls. 5(1)(1N), (1O).

58. *Id.* pt. 2, cls. 5(1)(1P)(1), (1Q)(1).

59. *Id.* pt. 2, cl. 5(1)(1R).

60. *Id.* pt. 2, cls. 5(1)(1S)(1), (1T)(1).

61. Schedules 1ZA and 1ZB FSMA are inserted under Schedule 3 in Bill. *Id.* sched. 3, sched. 1ZA, pt. 1, ¶¶ 1-14 (including specific provisions with regard to constitution, remuneration, internal arrangements, records, annual report, annual public meeting, report of annual meeting, and audit of accounts); pt. 2, ¶¶ 15-17 (regarding status); pt. 3, ¶¶ 18-21 (regarding penalties and fees); pt. 4, ¶¶ 22-24 (regarding miscellaneous, including exemption from liability and damages). Equivalent provisions with some amendment are imposed with regard to the FCA and PRA under Schedule 1ZB FSMA inserted under Schedule 3. *Id.* sched. 3, sched. 1ZB, pt. 1, ¶¶ 6-14 (regarding additional provisions on appointed members of the governing body); pt. 1, ¶ 15 (regarding terms of service); pt. 2, ¶¶ 24-25 (regarding exemption from the need to use "limited" in its name). More limited constitutional provisions in respect of the FPC are inserted in Schedule 2A of the BEA under Schedule 1 of the Bill. Earlier provisions on monitoring and enforcement and on investigation of complaints were removed from the Schedule in the June 2011 Bill and included in the sections of the January 2012 Bill in light of their importance. *Id.* pt. 2, cl. 5(1)(1A)(4).

## 2. Prudential Regulatory Authority (PRA)

The PRA is set up separately under the revised FSMA.<sup>62</sup> The Bill includes provisions with regard to the general duties of the PRA, the imposition of a specific insurance objective, additional objectives, interpretation and guidance of objectives, supervision, consultation, and Treasury review of the PRA activities. The PRA is to act, in so far as reasonably possible, in a way that advances its general objective.<sup>63</sup> The general objective of the PRA is to promote the safety and soundness of PRA-authorized persons, which involves ensuring that the business of such persons is carried out in a way that avoids any adverse effect on the stability of the U.K. financial system while seeking to ensure that any adverse effect of the failure of such a person is minimized.<sup>64</sup> The PRA is also to act in a way that is compatible with both its general objective and insurance objective, which is contributing to the securing of an appropriate degree of protection for those who are or may become policyholders.<sup>65</sup> Further objectives may be specified where the list of PRA-regulated activities is extended by order.<sup>66</sup> The PRA is expressly not required to ensure that no PRA-authorized person fails.<sup>67</sup> The PRA is to have regard to the same regulatory principles as the FCA in discharging its general functions.<sup>68</sup> The PRA is required to consult with PRA-authorized persons, or persons representing their interests, with appropriate panels being set up as necessary.<sup>69</sup> The PRA is required to consider any representations made and publish its responses to such representations from time to time.<sup>70</sup> The Treasury is given equivalent power to appoint an independent review of the economy, efficiency, and effectiveness with which the PRA uses its resources in discharging its functions.<sup>71</sup>

## 3. Common Provisions

The FCA and PRA are collectively referred to as the “regulators.”<sup>72</sup> Relevant constitutional investigation of complaints, status, penalties and fees, and other miscellaneous provisions (including immunity from liability in damages) are applied by way of amendment to Schedule 1 of the FSMA.<sup>73</sup> Similar regulatory principles to those applicable to the FSA

62. *Id.* pt. 2, ch. 2, cl. (2A)(1). The Prudential Regulation Authority Limited, which was set up before the Bill, is renamed the Prudential Regulation Authority (PRA) for the purposes of the Bill. *Id.*

63. *Id.* pt. 2, ch. 2, cl. (2B)(1).

64. *Id.* pt. 2, ch. 2, cl. (2B)(2)-(3). The adverse effects referred to may result from the disruption of the continuity of financial services. *Id.* pt. 2, ch. 2, cl. (2B)(4). The U.K. financial system includes financial markets and exchanges, regulated activities, and other activities connected with financial markets and exchanges. *Id.* pt. 2, cl. 5(1)(11). Failure includes insolvency, stabilization (under Part 1 of Banking Act 2009), or the authorized person is considered to be unable, or likely to be unable, to satisfy claims against it under the Financial Services Compensation Scheme. Insolvency includes bankruptcy, liquidation, bank insolvency, administration, bank administration, receivership, composition, or a scheme of arrangement. *Id.* pt. 2, ch. 2, cl. (2B).

65. *Id.* pt. 2, ch. 2, cl. (2C).

66. *Id.* pt. 2, ch. 2, cl. (2D).

67. *Id.* pt. 2, ch. 2, cl. (2F).

68. *Id.* pt. 2, ch. 2, cl. (2G).

69. *Id.* pt. 2, ch. 2, cl. (2K).

70. *Id.* pt. 2, ch. 2, cls. (2K)-(2L).

71. *Id.* pt. 2, ch. 2, cls. (2M)-(2N).

72. *Id.* pt. 2, ch. 3, cl. (3A)(2).

73. Schedules 1ZA and 1ZB FSMA inserted under Schedule 3 Bill. See *supra* note 61.

are restated with some amendment for the FCA and PRA. Both authorities are required, as with the FSA, to have regard for such generally accepted principles of good governance as are reasonably applicable.<sup>74</sup> New requirements are inserted governing the relationship between the FCA and PRA. The regulators are required to coordinate the exercise of their respective qualifying functions, including consulting and exchanging relevant information and to use their resources efficiently, economically, and proportionately.<sup>75</sup> The FCA is responsible for ensuring that with-profit insurance policyholders receive an appropriate degree of protection.<sup>76</sup> The regulators are to enter into an MOU specifying their respective roles and how they will comply with the duty to coordinate imposed regulations.<sup>77</sup> A draft MOU between the FCA and PRA was produced by the Bank of England and FSA in 2012.<sup>78</sup>

The Treasury may by orders allocate responsibilities between the regulators, including specifying primary or sole functions, subject to Parliamentary approval.<sup>79</sup> The PRA is given express power to direct the FCA not to take any regulatory action against a particular PRA-authorized person, or class of persons, in the exercise of the FCA's regulatory or insolvency powers.<sup>80</sup> The PRA must consider that the exercise may threaten the stability of the U.K. financial system or result in the failure of the person concerned, which would affect the system, and that the direction is necessary for either of these purposes.<sup>81</sup> The PRA must consult the FCA in advance and provide the Treasury with a copy of the direction, which must be submitted to Parliament.<sup>82</sup> Either regulator may issue directions to the other in connection with the consolidated supervision of some or all of the members of a group under relevant E.U. directives where one acts as the competent authority for the group.<sup>83</sup> The direction may require the other regulator to exercise, or not exercise, a relevant function.<sup>84</sup> Both regulators are subject to a general duty to take such steps as are considered appropriate to coordinate with the Bank in connection with its Financial Stability Objective and have a duty to notify the Treasury of the possible need for public

74. *Id.* pt. 2, ch. 3, cl. (3C).

75. *Id.* pt. 2, ch. 3, cl. (3D)(1).

76. *Id.* pt. 2, ch. 3, cl. (3F).

77. *See id.* pt. 2, ch. 3, cl. (3E)(1). Specified further provisions may be included in the MOU dealing with such matters as Part 4A permission applications, variation, requirements, disclosure, group applications, EEA passport and treaty rights, information gathering, and investigations, control, incoming firms, Lloyd's of London, records, and fees. *Id.* pt. 2, ch. 3, cl. (3E)(2). The MOU must contain provisions governing the coordination of relations with other non-U.K. bodies, E.U. authorities, and compensation scheme function. *Id.* pt. 2, ch. 3, cl. (3E)(3). The MOU must be reviewed annually with a revised copy being provided to the Treasury that must be laid before Parliament. *Id.* pt. 2, ch. 3, cl. (3E)(4), (6).

78. *See generally Draft Memorandum of Understanding Between the FCA and PRA*, FSA (Jan. 27, 2012) (U.K.), available at [http://www.fsa.gov.uk/about/what/reg\\_reform/mou-fca-pra](http://www.fsa.gov.uk/about/what/reg_reform/mou-fca-pra).

79. Financial Services Bill, pt. 2, ch. 3, cls. (3G)-(3H) (U.K.).

80. *Id.* pt. 2, ch. 3, cl. (3I).

81. *See id.* pt. 2, ch. 3, cl. (3I)(2), (4)-(5). The PRA may revoke the direction at any time. *Id.* pt. 2, ch. 3, cl. (3J).

82. *Id.* pt. 2, ch. 3, cl. (3K)(1), (4)-(5).

83. *Id.* pt. 2, ch. 3, cl. (3L)(4).

84. *Id.* pt. 2, ch. 3, cl. (3L)(5). Revocation is dealt with under section 3M with procedural provisions in section 3N.

funds, including the sharing of permitted relevant information.<sup>85</sup> The regulators may enter into arrangements for the provision of services between themselves.<sup>86</sup>

### III. Treasury Committee Report on Financial Regulation

The Treasury Select Committee within the House of Commons published an initial report on the Government's proposed revision of U.K. financial regulation at the end of January 2011.<sup>87</sup> This followed the Government's original consultation paper titled *A New Approach to Financial Regulation: Judgement, Focus and Stability*, published in July 2010, and anticipated the later follow-up document published in February 2011 and titled *A New Approach to Financial Regulation: Building a Stronger System*.<sup>88</sup> The Treasury Committee examined a number of provisional issues related to the proposed regulatory changes announced. These were principally concerned with the ambitious nature of the Government's timetable, references to the Bank of England as a "super regulator," the role and function of the PRA and FCA as well as regulatory cost, international regulatory integration, crisis management, transparency, and accountability. Each of these issues was considered in separate chapters within the February 2011 Report.

The Report noted the importance of the financial services industry within the U.K. economy and the need for it to be regulated in an effective but proportionate manner. The Committee was concerned that unnecessary urgency could be counter-productive, both in terms of financial stability and of certainty.<sup>89</sup> The Committee accepted the advantage of insulating economic policy from short-term political decision-making, although difficulties remained in defining and managing financial stability and the new macro-prudential policy. The Government had to confirm the nature of possible tools through the publication of draft secondary legislation in early course.

The Treasury Committee accepted that the purpose of regulatory reform was to reduce the possibility of systemic risk without undermining the economic contribution of financial services. The financial services industry contributed around 10 percent of U.K. GDP in 2009 and was still the largest corporation taxpayer in 2010, responsible for 11.2 percent of total tax receipts.<sup>90</sup> The financial crisis nevertheless cost the U.K. Government 74

85. See *id.* pt. 2, ch. 3, cl. (3P); pt. 4, cls. 54-55.

86. *Id.* pt. 2, ch. 3, cl. (3Q)(1).

87. A PRELIMINARY CONSIDERATION OF THE GOV'T'S PROPOSALS, *supra* note 6, at 27.

88. See JUDGEMENT, FOCUS AND STABILITY, *supra* note 5; BUILDING A STRONGER SYSTEM, *supra* note 5.

89. A PRELIMINARY CONSIDERATION OF THE GOV'T'S PROPOSALS, *supra* note 6, at 3.

90. Duncan McKenzie, *Financial Markets in the UK*, THECITYUK, Nov. 2010, at 3, <http://www.thecityuk.com/assets/Uploads/IFM201011.pdf>; see also PRICEWATERHOUSECOOPERS, THE TOTAL TAX CONTRIBUTION OF UK FINANCIAL SERVICES (3d ed. 2010), at 3, available at <http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/research-2010/Total%20Tax%20Contribution%20of%20UK%20Financial%20Services.ThirdEdition.pdf>. The Financial Services Sector Employed 993,000 people by sector end June 2012. McKenzie, *supra*, at 3. Banking made up 4.7 percent of GDP; insurance, 2 percent; fund management, 0.67 percent; and securities, derivatives, commodities, and bullion the remaining 2.63 percent. *Id.* at 6, 7, 10. The London Equity market was the second largest in the world with eleven percent of global market share in 2009. A PRELIMINARY CONSIDERATION OF THE GOV'T'S PROPOSALS, *supra* note 6, at 8. The insurance industry was the largest in Europe and third largest in the world with premiums in 2009 of £200 billion of premiums alone in 2009. *Id.* Lloyd's of London generated £22 billion of premia alone in 2009. *Id.* at 11. The U.K. fund management industry was the largest in the world with £4.1 trillion of assets under management in 2009. *Id.* at 8.

percent of GDP and the U.S. Government 73 percent of GDP.<sup>91</sup> Total global output in 2009 was around 6.5 percent lower than expected following the crisis.<sup>92</sup>

The Committee considered that the FPC should have a strong non-Bank representative element with separate accountability regimes having to be set up in respect of the FPC and the Bank's MPC. The regulatory approach to be adopted by the PRA, in respect of systemically important institutions,<sup>93</sup> had to be confirmed with the description of the FCA as being a "consumer champion" being "inappropriate, confusing and potentially dangerous."<sup>94</sup> The Committee supported the competition objective of the FCA although the overall cost of regulation had to be confirmed further as ultimately all direct and indirect costs would be passed back to the consumer. Uncertainties also remained with regard to the regulation of certain sectors and the division of responsibility between the PRA and the FCA, such as with regard to fund management and more complex groups.

#### IV. Joint Committee Report

The Joint Parliamentary Committee published its First Report on the Draft Financial Services Bill in December 2011.<sup>95</sup> The Joint Committee Report contained a number of recommendations to ensure that the new regulatory regime set up under the Bill secured its intended objective of preventing any future calamitous systemic failure of the U.K. financial sector. The recommendations were specifically intended to ensure that the new

91. Piergiorgio Alessandri & Andrew G. Holdane, *Banking on the State*, BANK ENG. 23 (Nov. 2009), <http://www.bankofengland.co.uk/publications/Documents/speeches/2009/speech409.pdf> (based on a presentation delivered at the Federal Reserve Bank of Chicago twelfth annual International Banking Conference on "The International Financial Crisis: Have the Rules of Finance Changed?").

92. Andrew G. Haldane, Exec. Dir. of Fin. Stability at the Bank of Eng., Comments at the Institute of Regulation & Risk, Hong Kong, The \$100 Billion Question (Mar. 30, 2010), at 2, *available at* <http://www.bis.org/review/r100406d.pdf>.

93. See, e.g., FSB, POLICY MEASURES TO ADDRESS SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS (Nov. 4, 2011) (U.K.), [http://www.financialstabilityboard.org/publications/r\\_111104bb.pdf](http://www.financialstabilityboard.org/publications/r_111104bb.pdf); FSB, EFFECTIVE RESOLUTION OF SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS (July 19, 2011) (U.K.), [http://www.financialstabilityboard.org/publications/r\\_110719.pdf](http://www.financialstabilityboard.org/publications/r_110719.pdf); FSB, REDUCING THE MORAL HAZARD POSED BY SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS: FSB RECOMMENDATIONS AND TIME LINES (Oct. 20, 2010) (U.K.), [http://www.financialstabilityboard.org/publications/r\\_101111a.pdf](http://www.financialstabilityboard.org/publications/r_101111a.pdf); FSB, REDUCING THE MORAL HAZARD POSED BY SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS: INTERIM REPORT TO G20 LEADERS (June 18, 2010), (U.K.) [http://www.financialstabilityboard.org/publications/r\\_100627b.pdf](http://www.financialstabilityboard.org/publications/r_100627b.pdf). See also MACROECONOMIC ASSESSMENT GROUP, FSB & BASEL COMMITTEE ON BANKING SUPERVISION, ASSESSMENT OF THE MACROECONOMIC IMPACT OF HIGHER LOSS ABSORBENCY FOR GLOBAL SYSTEMICALLY IMPORTANT BANKS (Oct. 10, 2011) (U.K.), <http://www.bis.org/publ/bcbs202.pdf>; BASEL COMMITTEE ON BANKING SUPERVISION, BIS, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT (July 2011), <http://www.bis.org/publ/bcbs201.pdf>; Press Release, Bank for Int'l Settlements, Measures for Global Systemically Important Banks Agreed by the Grp. of Governors and Heads of Supervision (June 25, 2011), <http://www.bis.org/press/p110625.htm>; IMF, BIS & FSB, REPORT TO G20 FINANCE MINISTERS AND GOVERNORS, GUIDANCE TO ASSESS THE SYSTEMIC IMPORTANCE OF FINANCIAL INSTITUTIONS, MARKETS AND INSTRUMENTS: INITIAL CONSIDERATIONS (Oct. 2009), <http://www.bis.org/publ/othp07.pdf>; FSB, UNDERSTANDING FINANCIAL LINKAGES: A COMMON DATA TEMPLATE FOR GLOBAL SYSTEMICALLY IMPORTANT BANKS (Oct. 6, 2011) (U.K.), [http://www.financialstabilityboard.org/publications/r\\_111006.pdf](http://www.financialstabilityboard.org/publications/r_111006.pdf).

94. A PRELIMINARY CONSIDERATION OF THE GOV'T'S PROPOSALS, *supra* note 6, at 4.

95. JOINT COMMITTEE ON THE DRAFT FINANCIAL SERVICES BILL, DRAFT FINANCIAL SERVICES BILL, 2010-12, H.L. 236, H.C. 1447 (U.K.).

authorities had the correct objectives, powers, and responsibilities and that appropriate systems of accountability were in place. The Joint Committee specifically considered the objectives of the FPC, the PRA, and the FCA; their responsibilities and powers; and the need to establish an appropriate accountability, transparency, and enforcement regime.<sup>96</sup>

The Joint Committee accepted that no regulatory structure could prevent any future banking failures or crises, irrespective of how well it was designed, with legislation having to make proper provision for handling crises and resolving bank failures. The crisis had significant economic, social, and political impact within the United Kingdom and highlighted weaknesses in the earlier tripartite regulatory structure, FSA supervision and crisis management arrangements, and resolution procedures. It was considered that successful regulation was dependent more on the regulatory culture, focus, and philosophy than structure in ensuring the effective handling of risk. The assumption of rational perfect markets was questioned and the earlier U.K. regulatory structure criticized for not having been focused on financial stability. The Joint Committee recommended the adoption of a key “cultural change” towards the adoption of a more “forward looking supervision” approach, with regulatory staff having appropriate experience, approach, and attitude. The Joint Committee Report was more concerned with culture from a regulatory, rather than internal firm, perspective, although it did stress the need for effective risk management overall. The Report made repeated reference to the ICB recommendations on ring-fencing and higher capital requirements.<sup>97</sup> The Joint Committee strongly supported the ICB proposals and recommended that the legislation be brought forward during the 2012-2013 Parliamentary Session to provide banks with a clear framework for implementing the recommendations as quickly as possible.

The Joint Committee recommended that the Treasury and Parliament be given more oversight powers over the macro-prudential activities of the FPC. The recommendations included replacing the Bank of England’s Court of Directors with a “Supervisory Board” that would include some members with direct experience of operating in the financial services industry. The Supervisory Board should have specific responsibility to review the performance of the FPC and to be consulted on the appointment of any new Governor to the Bank. The FPC should be treated on an equal basis with the Bank’s existing Monetary Policy Committee (MPC) with FPC membership being extended to include insurance and wider economic interest. External members should have a majority voting position as against internal Bank staff with reports on major regulatory failure being prepared on a regular basis. The objectives of the PRA and FSA should be clarified. A number of specific recommendations were made to extend the powers of the PRA and FCA.

## V. Prudential Regulation Authority

The Bank of England and the FSA issued a joint paper in May 2011 on the supervisory approach to be adopted by the Prudential Regulatory Authority (PRA).<sup>98</sup> A separate paper on the supervision of insurance companies was to be released in May 2011, although this

96. *Id.* at 7, 13, 22, 26-27.

97. *See infra* Part VII.

98. BANK OF ENGLAND & FSA, THE BANK OF ENGLAND, PRUDENTIAL REGULATION AUTHORITY: OUR APPROACH TO BANKING SUPERVISION (May 2011), [http://www.bankofengland.co.uk/publications/Documents/other/financialstability/uk\\_reg\\_framework/pru\\_approach.pdf](http://www.bankofengland.co.uk/publications/Documents/other/financialstability/uk_reg_framework/pru_approach.pdf).

was delayed until June 2011 with a separate paper on the FCA. Both documents were updated in 2012.<sup>99</sup> The Bank and FSA had arranged a launch Conference for the PRA on May 19, 2011.

The role of the PRA would undertake the key regulatory functions within the new regime as it would principally be responsible for supervising firms holding at least £9 trillion in assets, which was seven times the U.K. GDP with U.K. banks alone holding five times the U.K. GDP.<sup>100</sup> The PRA would regulate 157 U.K.-incorporated banks, 48 building societies, 652 credit unions, and 162 branches of overseas banks from the European Economic Area (EEA) and globally.<sup>101</sup> Around 2,000 firms would be subject to PRA oversight.<sup>102</sup>

The PRA supervisory paper deals with underlying supervisory principles, scope, risk assessment framework, supervision, policymaking and firm authorization, and individual approval. The new approach was being developed by the Prudential Business Unit, which was set up within the FSA on April 4, 2011, in cooperation with the Bank of England.<sup>103</sup>

#### A. PRA PRINCIPLES

The single objective of the PRA would be to promote the safety and soundness of regulated firms and, in so doing, to minimize any adverse effects of firm failure on the U.K. financial system. The PRA would not be required to ensure that no authorized firm fails, which would remain the responsibility of firm management, board, and shareholders.<sup>104</sup> PRA supervision would be targeted at firms' resilience (capital, liquidity, and leverage), interventions, and resolution.<sup>105</sup> All firms would be subject to a baseline level of supervisory oversight, which would reduce the probability of failure or that a firm failed in an orderly manner.<sup>106</sup> The PRA would work closely with the Financial Policy Committee (FPC) within the Bank to combine individual and larger system's oversight.<sup>107</sup> Supervi-

99. See FSA, *THE FINANCIAL CONDUCT AUTHORITY: APPROACH TO REGULATION* (June 2011) (U.K.), [http://www.fsa.gov.uk/pubs/events/fca\\_approach.pdf](http://www.fsa.gov.uk/pubs/events/fca_approach.pdf); and BANK OF ENGLAND & FSA, *THE BANK OF ENGLAND, PRUDENTIAL REGULATION AUTHORITY: OUR APPROACH TO INSURANCE SUPERVISION* (June 2011), [http://www.bankofengland.co.uk/publications/Documents/other/financialstability/uk\\_reg\\_framework/pr\\_a\\_approach2.pdf](http://www.bankofengland.co.uk/publications/Documents/other/financialstability/uk_reg_framework/pr_a_approach2.pdf). See also BANK OF ENGLAND & FSA, *THE BANK OF ENGLAND, PRUDENTIAL REGULATION AUTHORITY: OUR APPROACH TO BANKING SUPERVISION* (Oct. 2012), <http://www.bankofengland.co.uk/publications/Documents/other/pr/bankingappr1210.pdf>; and BANK OF ENGLAND & FSA, *THE BANK OF ENGLAND, PRUDENTIAL REGULATION AUTHORITY: OUR APPROACH TO INSURANCE SUPERVISION* (Oct. 2012), <http://www.bankofengland.co.uk/publications/Documents/other/pr/insuranceappr1210.pdf>. For discussion on the Financial Conduct Authority, see *infra* Part VI.

100. *OUR APPROACH TO INSURANCE SUPERVISION*, *supra* note 98, at 7.

101. *Id.*

102. *Id.*

103. Arun Srivastava et al., *Replacing the FSA: Responding to the New Regulatory Architecture*, BAKER & MCKENZIE, March 2011, at 6, [http://www.bakermckenzie.com/files/Publication/8f4935a8-d6f7-4f23-821e-ee91a3ec61fe/Presentation/PublicationAttachment/dd8cd5c6-b659-49c1-bbea-f23ff090643b/al\\_london\\_respondingregulatoryarchitecture\\_mar11.pdf](http://www.bakermckenzie.com/files/Publication/8f4935a8-d6f7-4f23-821e-ee91a3ec61fe/Presentation/PublicationAttachment/dd8cd5c6-b659-49c1-bbea-f23ff090643b/al_london_respondingregulatoryarchitecture_mar11.pdf). See generally *Prudential Business Unit*, FSA, <http://www.fsa.gov.uk/about/who/management/retail> (last visited Oct. 5, 2012).

104. *OUR APPROACH TO INSURANCE SUPERVISION*, *supra* note 98, ¶ 3.

105. *Id.* ¶ 4.

106. *Id.* ¶ 6.

107. *Id.* ¶ 7.

sion would be risk based, targeted at the principal risks, be forward-looking, and require corrective action at an early stage to reduce the probability of disorderly failure.<sup>108</sup>

Supervisory staff would be required to form judgments on current and future risks to a firm's safety and soundness, with major judgments requiring the involvement of senior and experienced individuals. The process was referred to as "rigorous and well-documented."<sup>109</sup> Arrangements would be adopted to ensure cooperation between the PRA, the FCA, the FPC, the Financial Services Compensation Scheme (FSCS), the Special Resolution Unit (SRU), and other parts of the Bank involved with macro-prudential analysis, market intelligence, and infrastructure oversight.<sup>110</sup> The new policy would attempt to learn from the lessons of previous regulatory failures, as well as be properly coordinated with international and E.U. regulatory developments and ensure proper public accountability.<sup>111</sup>

#### B. PRA SCOPE

The PRA would be responsible for the regulation of firms holding £9 trillion in assets and EEA firms with £2 trillion in assets.<sup>112</sup> The U.K. market was nevertheless highly concentrated with "[85] percent of personal current accounts being provided by the five largest firms."<sup>113</sup> Financial services contributed 10 percent of U.K. GDP and banking contributed 5 percent of U.K. GDP.<sup>114</sup> The PRA would also be responsible for the supervision of other firms that could present a significant risk to the stability of the financial system or to one or more PRA supervised entities within the same group.<sup>115</sup> It was expected that this would include investment firms authorized to deal in investments as principal on their own account subject to additional designation criteria having regard to the size of the firm, substitutability of services, complexity, and interconnectedness. Other shadow banking activities may also be brought within the scope of supervision with the FPC monitoring the new "regulatory perimeter."

#### C. PRA RISK ASSESSMENT FRAMEWORK

The PRA would focus its resources on firms that generated the greatest risk to the stability of the U.K. financial system.<sup>116</sup> A provisional risk assessment framework had been produced based on "gross risk" and "safety and soundness" with an assessment of potential impact and "risk context" (external and business risks) with regard to gross risk and risk mitigation factors in connection with safety and soundness, including operational (risk management and controls and management and governance), financial (liquidity and capital), and structural mitigation (resolvability).<sup>117</sup> This would assess the impact of firm

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108. *Id.* ¶ 12.

109. *Id.* ¶ 15.

110. *Id.* ¶ 16.

111. *Id.* ¶¶ 17-18.

112. *Id.* ¶ 22.

113. *Id.* ¶ 23.

114. *Id.* ¶ 24.

115. *Id.* ¶ 25.

116. *Id.* ¶ 26.

117. FINANCIAL CONDUCT AUTHORITY: APPROACH TO REGULATION, *supra* note 99, Fig. 1.



failure on the stability of the system and on whether orderly resolution was feasible and credible.<sup>118</sup> The channels through which a firm might affect the stability of the system would be assessed having regard to impairment of the system to carry out its functions. The PRA would take into account loss of access to payment services.<sup>119</sup>

In considering risk context, the PRA would assess how the external macroeconomic and business context may affect the execution of a firm's business model under different scenarios. The PRA would then assess factors that may mitigate the adverse impact of a firm on the stability of the system including resolvability, financial strength (liquidity and capital), and risk management and governance.<sup>120</sup>

#### D. PRA SUPERVISION

The PRA's approach to supervisory assessment was again described as being based on "forward-looking [judgments]" with "supervisory interventions" being clearly directed at reducing any major risk to the stability of the system.<sup>121</sup> All firms would be subject to a baseline level of supervisory reporting with the PRA's approach being more intensive where firms posed a greater risk to the system.<sup>122</sup> Supervisory assessment would be focused on business risks, financial strength, risk management and governance, and resolvability.<sup>123</sup> The PRA would work closely with auditors and internal finance, risk and compliance functions within firms, and use available external data.<sup>124</sup> The PRA would identify where further corrective action was required by firms<sup>125</sup> and use its statutory powers to secure necessary and remedial action on an *ex ante* basis.<sup>126</sup>

The PRA would create a new "Proactive Intervention Framework" (PIF) to support the early identification of risks and actions in preparation for failure or resolution.<sup>127</sup> This would be based on five stages of low risk to the viability of the firm, with no additional supervisory action being required; moderate, material, and imminent risks to the viability of the firm (Stages 2, 3, and 4), with specified recovery and resolution actions; and final resolution and winding-up (Stage 5).<sup>128</sup> All firms would be placed within the PIF as appropriate although necessary adjustments would have to be made for dealing with EEA firms due to the limited powers available to the PRA under E.U. law.

#### E. PRA POLICY

Prudential policies were stated to set out the high-level framework and expectations against which firms were to be assessed with prudential rules establishing minimum stan-

118. OUR APPROACH TO INSURANCE SUPERVISION, *supra* note 98, ¶ 27.

119. *Id.* ¶¶ 28-31.

120. *Id.* ¶¶ 32-36.

121. *Id.* ¶ 37.

122. *Id.* ¶¶ 38, 40.

123. *Id.* ¶¶ 46-64.

124. *Id.* ¶¶ 65-74.

125. *Id.* ¶ 75.

126. *Id.* ¶ 80.

127. *Id.* at Box 5.

128. *Id.* at Box A.

dards and prudential policy supporting judgment-based supervision.<sup>129</sup> Policies and rules should be clear, intent, robust, and support timely intervention<sup>130</sup> with firms being required to comply with “the spirit as well as the letter of its rules.”<sup>131</sup> The PRA would continue to use cost and benefit analysis<sup>132</sup> and be responsible for ensuring that remuneration policies and practices were properly risk aligned.<sup>133</sup>

#### F. PRA AUTHORIZATION AND APPROVAL

The PRA would deal with applications for authorization<sup>134</sup> with an assessment of resolvability being “embedded into the [authorization] process.”<sup>135</sup> Authorization would be determined on a “‘whole firm’ basis,”<sup>136</sup> with the FCA having to consent on the grant of relevant permission.<sup>137</sup> The PRA would determine the approval of individuals carrying on significant influence functions in cooperation with the FCA. It was expected that this would include around 5,000 individuals within the 2,000 firms regulated by the PRA covering approximately 12,500 roles.<sup>138</sup>

### VI. Financial Conduct Authority

The strategic objective of the FCA was stated in the earlier consultation documents to be to “protect and enhance confidence in the [U.K.] financial system” with three operational objectives of “securing an appropriate degree of protection for consumers,” promoting “efficiency and choice in the market for financial services,” and “protecting and enhancing” financial system integrity.<sup>139</sup> This was later amended in the January 2012 Bill with the FCA’s strategic objective being to “[ensure] that the relevant markets function well” and with the three further operational objectives of consumer protection, integrity, and competition.<sup>140</sup>

The FSA held an FCA launch Conference in London in June 2011 to discuss the FCA’s new regulatory approach and operating model.<sup>141</sup> The FCA’s new regulatory approach can be summarized in terms of “preventative action,” tackling problems rather than symptoms, differentiation, securing fair and safe markets, “engaging with retail consumers,” “credible deterrence” in addition to proper transparency and disclosure as well as account-

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129. *Id.* ¶ 91.

130. *Id.* ¶ 92.

131. *Id.* ¶ 93.

132. *Id.* ¶ 105.

133. *Id.* ¶ 107.

134. *Id.* ¶ 110.

135. *Id.* ¶ 113.

136. *Id.* ¶ 112.

137. *Id.* ¶ 114.

138. *Id.* ¶ 118.

139. BUILDING A STRONGER SYSTEM, *supra* note 5, at 61–62.

140. SECURING STABILITY, PROTECTING CONSUMERS, *supra* note 2, at 28.

141. See, e.g., Hector Sants, Chief Exec., FSA, Speech at the Financial Conduct Authority Conference (June 28, 2011), available at [http://www.fsa.gov.uk/library/communication/speeches/2011/0628\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2011/0628_hs.shtml); see also Margaret Cole, Interim Managing Dir. of the Conduct Bus. Unit, FSA, Financial Conduct Authority: A New Regulatory Approach (June 28, 2011), available at [http://www.fsa.gov.uk/library/communication/speeches/2011/0628\\_mc.shtml](http://www.fsa.gov.uk/library/communication/speeches/2011/0628_mc.shtml).

ability.<sup>142</sup> The FCA will have new powers of product intervention, although the FSA has already issued substantial new guidelines in this regard. The FCA will be able to withdraw or amend misleading financial promotions and publish information on relevant issues using warning notices, although these are connected with technical powers rather than any new regulatory approach.<sup>143</sup> The FCA will be expected to make more “[judgmental] trade-offs” between different, desirable objectives.<sup>144</sup> The FCA will attempt to develop a new regulatory culture and “aspire to command the respect of consumers and of the firms it regulates.”<sup>145</sup> It will have a new organizational culture and behavior that “reflects, and is best equipped to deliver, its new role and wide-ranging responsibilities” with a culture based on “[judgment] and sound analysis.”<sup>146</sup> It will also be transparent and cooperative, as well as clear and succinct, taking prompt action to achieve its goals.<sup>147</sup> Its decision-making process will, in particular, consist of a “senior level, high quality, business and market analysis team” that will provide the analysis required “to understand how markets work and how they interact with consumer [behavior].”<sup>148</sup> This is already reflected in the FSA’s new post-crisis supervisory response, especially in such areas as product regulation.

It was also announced in January 2012, at the time of the release of the full Draft Financial Services Bill, that the FCA would become responsible for consumer credit regulation under the Consumer Credit Act 1974.<sup>149</sup> These functions were previously carried out by the Office of Fair Trading (OFT) in the United Kingdom. The Government had released an earlier consultation document on the transfer of these functions in December 2010.<sup>150</sup>

## VII. Independent Commission on Banking

The Independent Commission on Banking (ICB) produced its interim report on April 11, 2011.<sup>151</sup> This contained a number of provisional recommendations to strengthen the U.K. banking system and to promote competition at the same time as avoid the costs of any future bailout being born by the public through the Treasury.<sup>152</sup> The ICB was originally set up by the Chancellor of the Exchequer on June 16, 2010 and was to report to the

142. FINANCIAL CONDUCT AUTHORITY: APPROACH TO REGULATION, *supra* note 99, ¶¶ 4.3, 4.6, 4.8–4.10, 4.13, 4.16–4.17.

143. *Id.* ¶ 1.9.

144. *Id.* ¶ 1.5.

145. *Id.* ¶ 1.15.

146. *Id.*

147. *Id.*

148. *Id.* ¶ 1.19.

149. Press Release, HM Treasury, Government Publishes Financial Services Bill (Jan. 27, 2012), [http://www.hm-treasury.gov.uk/press\\_08\\_12.htm](http://www.hm-treasury.gov.uk/press_08_12.htm).

150. HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: CONSULTATION ON REFORMING THE CONSUMER CREDIT REGIME (Dec. 2010) (U.K.); *see also* HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: SUMMARY OF RESPONSES TO CONSULTATION ON REFORMING THE CONSUMER CREDIT REGIME (July 2011) (U.K.); DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, OPTIONS FOR REFORM TO REGULATORY FRAMEWORK FOR CONSUMER CREDIT (Dec. 2010) (U.K.). The HM Treasury’s consultation documents and impact assessment related to reforming the consumer credit regime are available online at: [http://www.hm-treasury.gov.uk/consult\\_consumer\\_credit.htm](http://www.hm-treasury.gov.uk/consult_consumer_credit.htm).

151. INTERIM REPORT, *supra* note 7.

152. *Id.*

Cabinet Committee on Banking Reform by the end of September 2011.<sup>153</sup> The ICB was chaired by Sir John Vickers with Clare Spotswood, Martin Taylor, Bill Winters, and Martin Wolf.<sup>154</sup> The Commission held around nine meetings between July 2010 and April 2011 with separate public events in Cardiff and London.

The Commission published an initial Issues Paper in September 2010 as a call for evidence that contained a number of possible options for reform.<sup>155</sup> The Issues Paper examined the U.K. banking sector (Chapter 2, "Where we are now"),<sup>156</sup> relevant issues (Chapter 3, "Issues"),<sup>157</sup> and options for reform (Chapter 4).<sup>158</sup> The issues identified by the Commission included financial stability, competition, interaction of financial stability and competition, lending and the pace of economic recovery, the competitiveness of U.K. financial services and the wider economy, and the risk to the Government's fiscal position.<sup>159</sup> Separate structural and non-structural reform options were identified with regard to banks and markets.

The objective of the Interim Report was to set out the Commission's initial and provisional views on stability and competition reform.<sup>160</sup> The Report was generally based on the premise that improved stability requires that banks can absorb losses without reliance on the taxpayer and that businesses can fail safely without undue damage to the rest of the financial system and wider economy. This has partly been dealt with by separate initiatives to improve capital and liquidity, recovery and resolution, and market infrastructure, although the Commission attempted specifically to consider whether structural separation—in particular, between retail and investment banking—would promote stability.<sup>161</sup> The ICB rejected more draconian structural options, including separating commercial and investment banking outright or adopting a full "subsidiarisation" model that would separate these activities across different companies within larger groups. A more limited form of partial subsidiarisation was recommended with the insulation of retail operations to protect depositors and the provision of critical functions. An equity Tier 1 capital ratio of at least 10 percent would be imposed on the retail activities of systemically important lenders with a 7 percent ratio for wholesale and investment banking. This would be supplemented by additional convertible debt.

The ICB released its Final Report on September 12, 2011, which set out its full recommendations following the further consultation responses received to its Interim Report in April 2011.<sup>162</sup> The ICB had received 170 responses with a substantial amount of further

153. Press Release, HM Treasury, Sir John Vickers to Chair the Indep. Comm'n on Banking (June 16, 2010) (U.K.), [http://www.hm-treasury.gov.uk/press\\_11\\_10.htm](http://www.hm-treasury.gov.uk/press_11_10.htm).

154. *The Independent Commission on Banking: Background*, HM TREASURY, [http://www.hm-treasury.gov.uk/fin\\_stability\\_regreform\\_icb.htm](http://www.hm-treasury.gov.uk/fin_stability_regreform_icb.htm) (last visited Oct. 6, 2012).

155. CALL FOR EVIDENCE, *supra* note 7.

156. *Id.* at 9.

157. *Id.* at 17.

158. *Id.* at 31.

159. *Id.* at 17-29.

160. INTERIM REPORT, *supra* note 7, at 1.

161. *Id.* at 3.

162. FINAL REPORT, *supra* note 8, at 23.

analytical work having been conducted, in particular, on the design of the ring-fence and the cost benefit analysis of the reforms proposed.<sup>163</sup>

In introducing the Final Report, Sir John Vickers noted that the Commission had considered the recent deteriorating economic conditions over summer 2011 and associated regulatory developments within Europe and at the international level.<sup>164</sup> Sir John restated the Commission's earlier aim of creating a more stable and competitive U.K. banking system. This had to be less likely to cause or be susceptible to financial crises, avoid the taxpayer being responsible for the losses generated, and be more effective and efficient in providing the core services of safeguarding retail deposits, operating secure payments systems, and channeling savings to productive investments in the economy.

The ICB confirmed its provisional recommendations of requiring banks to hold more equity capital and loss absorbing debt and with retail banking activities being structurally separated within a retail ring-fence.<sup>165</sup> Structural separation was stated to insulate vital retail banking services from global disturbances, to make it easier and less costly to resolve banks, and to improve competitiveness. The ring-fence would be strong but flexible. Only core mandated services would be permitted within the ring-fence; certain activities would constitute prohibited services, while others either being held within or outside the ring-fence at the bank's option. Ring-fenced banks had to be self-standing subsidiaries with sufficient own capital, governance arrangements and independence, and with intra-group lending restrictions applying to protect the integrity of the ring-fence.

Equity capital levels for ring-fenced institutions would be increased to at least 10 percent of risk-weighted assets with corresponding limits on leverage and with ring-fenced and non-ring-fenced entities being required to hold an additional seven to 10 percent of loss absorbing capital in the form of convertible debt or "bail-in" bonds.<sup>166</sup> Insured depositors would receive an automatic "depositor preference" on the insolvency of a ring-fenced bank.

The Commission remained concerned with the lack of competition within U.K. retail banking and especially with Personal Current Accounts (PCAs) and Small and Medium-Sized Enterprise (SME) banking services being over-concentrated. The divestiture of branches and business from Lloyds Banking Group (LBG) would be insufficient to allow the emergence of a strong challenger bank within the industry although the ICB did not recommend any increase in the European Commission's original number of branches to be disposed. Customers should be able to transfer accounts between banks with an effective switching system being set up within two years and with service transparency being increased. The new FCA to be set up in the U.K. should be given a specific competition objective. The ICB did not recommend that banking markets be referred to the Competition Commission for independent investigation at that stage although a market investigation reference may be required if its other recommendations were not brought into effect by 2015. The ICB's general recommendations should otherwise be implemented by the

163. INDEP. COMM'N ON BANKING, RESPONSES TO INTERIM REPORT (July 13, 2011) (U.K.), [http://bankingcommission.independent.gov.uk/?page\\_id=835](http://bankingcommission.independent.gov.uk/?page_id=835).

164. HM TREASURY, INDEP. COMM'N ON BANKING, FINAL REPORT PUBLICATION OPENING REMARKS BY SIR JOHN VICKERS (2010) (U.K.), *available at* <http://bankingcommission.independent.gov.uk/>.

165. FINAL REPORT, *supra* note 8, at 7-18.

166. *Id.* at 13.

beginning of 2019 in line with the new Basel Committee recommendations on bank capital adequacy and liquidity (Basel III).

The Final Report examined financial stability in terms of providing an overview of the Commission's approach and proposals (Chapter 2)<sup>167</sup> with a more detailed examination of its recommendations on the retail ring-fence (Chapter 3),<sup>168</sup> loss absorbency (Chapter 4),<sup>169</sup> and the economic impact and implementation of its financial stability reforms (Chapter 5).<sup>170</sup> On competition, the Report contains an overview of relevant competition concerns, market assessment, and consequent recommendations (Chapters 6, 7, and 8).<sup>171</sup> In addition to final recommendations (Chapter 9),<sup>172</sup> the Report contains a glossary, a summary of responses to the Interim Report, a review of other financial stability and competition reforms, an assessment of the economic impact of the stability recommendations, and a response to criticism of the competition analysis set out in the Interim Report (Annexes 1-4).<sup>173</sup>

The Government published its response to the ICB Report on December 19, 2011.<sup>174</sup> The Chancellor of the Exchequer issued a statement on banking reform in the House of Commons.<sup>175</sup> The Chancellor noted that Britain should remain one of the world's leading financial centers with financial services employing 1.4 million jobs and the banking system being almost 500 percent of GDP.<sup>176</sup> Action would accordingly be taken to strengthen the regulatory system with the creation of the FPC and PRA and with the Government undertaking to implement the principal recommendations of the ICB. The total amount of official support for the U.K. financial system during the financial crisis was stated to be £1.2 trillion by the National Audit Office (NAO).<sup>177</sup> The Chancellor referred to this as "the British Dilemma" with the banking system providing vital services

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167. *Id.* at 23.

168. *Id.* at 35.

169. *Id.* at 79.

170. *Id.* at 123.

171. *Id.* at 165.

172. *Id.* at 233.

173. *Id.* at 253-356.

174. HM TREASURY, THE GOVERNMENT RESPONSE TO THE INDEPENDENT COMMISSION ON BANKING, 2011, Cm. 8252 (U.K.).

175. Rt. Hon George Osborne, Chancellor of the Exchequer, Banking Reform Statement by the Chancellor of the Exchequer (Dec. 19, 2011), [http://www.hm-treasury.gov.uk/statement\\_chx\\_191211.htm](http://www.hm-treasury.gov.uk/statement_chx_191211.htm).

176. *Id.*

177. One-hundred and twenty four billion pounds sterling was provided directly in funds including through the purchase of RBS Ordinary and B Shares (£45.8 billion), LBG shares (£20.6 billion), Northern Rock Plc. shares (£1.4 billion), Northern Rock (Asset Management) Loan (£21.6 billion), Bradford & Bingley Working Capital Facility (£8.6 billion), and other loans to support deposits (£26 billion). NAT'L AUDIT OFFICE, HM TREASURY, THE COMPTROLLER AND AUDITOR GENERAL'S REPORT ON ACCOUNTS TO THE HOUSE OF COMMONS: THE FINANCIAL STABILITY INTERVENTIONS 8 (July 13, 2011) (U.K.). A potential liability of £1.03 trillion was also taken on through guarantees and contingent liabilities including in respect of Northern Rock (Guaranteed Liabilities of £24 billion, Contingent Capital of £3.4 billion, and unused Working Capital Facility of £3.8 billion), Bradford & Bingley (Guaranteed Liabilities of £17 billion and unused Working Capital Facility of £3 billion), RBS and LBG (Asset Protection Scheme of £457 billion and Contingent Capital in RBS of £8 billion), as well as other sector-wide schemes, including the Credit Guarantee Scheme (£20 billion), Special Liquidity Scheme (£200 billion), Asset Backed Securities Scheme (£50 billion), Recapitalisation Fund (£13 billion), and unused facilities for loans to support deposits (£310 million). *Id.* at 6.

and the United Kingdom being an important global financial center while the total size of U.K. financial services could not be “underwritten by the British taxpayer.”<sup>178</sup>

The Government supported the ICB key objectives of making banks better able to absorb losses, making it easier and less costly to sort out banks that get into trouble and to limit incentives for excessive risk-taking.<sup>179</sup> A dual approach would be adopted through the ring-fencing of vital banking services and increasing banks’ loss absorbency. The Government agreed that vital banking services, and in particular retail deposits, should be provided through ring-fenced banks that should be prohibited from undertaking certain investment banking activities. Mandated services within the ring-fence would consist of retail and SME deposits and overdrafts with wholesale investment banking services being prohibited, although ring-fenced banks would be allowed to conduct certain ancillary services in support of their core functions. Ring-fenced banks would be legally and operationally independent and not dependent on the rest of the group for liquidity and solvency. Further work would be undertaken to implement all of the principles made with the Government also considering whether a *de minimis* exemption should be provided.

The Government supported the ICB’s recommendations on loss absorbency in addition to structural ring-fencing.<sup>180</sup> Higher equity requirements would be introduced for large ring-fenced banks with necessary flexibility being obtained through E.U. measures. A minimum leverage ratio would be applied to all banks with a higher minimum ratio for larger banks. Resolution authorities would be provided with a statutory bail-in power to assist resolution with the Government working to ensure that equivalent provisions were adopted within European crisis management arrangements. Systemically important banks should hold a further amount of loss absorbing capital on a group-wide basis although non-U.K. operations may be exempt where there was no risk to U.K. financial stability. While the Government supported depositor preference, further work and consultation would be undertaken. A distinction was drawn between critical service protection and investor protection with losses being imposed on investors, including creditors, where necessary. All banks should be subject to normal competitive forces and be capable of necessary resolution without reliance on any implicit government guarantee and risking critical services. The Government would also adopt special resolution measures for investment firms and financial holding companies in addition to banks.<sup>181</sup>

The Government accepted the ICB recommendations on improving competition especially through the creation of a strong and effective challenger bank with the Lloyds divestiture.<sup>182</sup> Action would be taken to limit barriers to entry and anti-competitive prudential requirements, to improve switching, to enhance transparency, and to secure pro-competitive financial regulation. The government’s earlier perceived, implicit guarantee for “too big to fail” banks would be removed, which was stated to remove distortions within the European single market. The Government also accepted the Treasury Select Committee recommendation that the Payments Council should be brought within the scope of U.K. regulation.

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178. See GOV’T RESPONSE TO THE INDEP. COMM’N ON BANKING, *supra* note 174, ¶¶ 1.8-1.9.

179. *Id.* at 5.

180. *Id.* at 6.

181. *Id.* at 17 (discussing resolving investment banks); 19-20 (summarizing other U.K. and international financial regulation).

182. *Id.* at 8.

The Government estimated that the aggregate private cost to U.K. banks of implementation of the ICB recommendations would be around £3.5 to £8.0 billion as against the £4.0 to £7.0 billion ICB figure.<sup>183</sup> This should produce a gross reduction in the GDP of £0.8 to £1.8 billion, which was less than the £1.0 to £3.0 billion estimated by the ICB.<sup>184</sup> The ICB claimed that its recommendations could reduce the annualized cost of financial crisis by up to £40 billion a year.<sup>185</sup> The Government estimated that if other regulatory reforms reduce the probability of crisis by 30 percent and the ICB recommendations by a further 10 percent, the incremental economic benefit would be £9.5 billion per year even assuming an output loss of 25 percent.<sup>186</sup>

Further primary and secondary legislation would be adopted to give effect to the ring-fence recommendations which would be enacted before the end of the current Parliament in May 2015, with banks being expected to comply as soon as practicably possible.<sup>187</sup> A reasonable transitional timetable would be provided for. A White Paper is to be produced during 2012 containing detailed proposals on the implementation of the ICB recommendations.

### VIII. Government Regulatory Policy

The Coalition Government has taken forward a number of other separate policy initiatives in connection with financial stability and financial growth more generally within the U.K. economy.<sup>188</sup> This larger financial services policy agenda includes the institutional restructuring referred to with the creation of the FPC, PRA, and FCA, as well as the setting up and acceptance of the recommendations of the ICB under Sir John Vickers. The Labour Administration had earlier set up U.K. Investments Limited to manage the government's interests in recapitalized banks with the distressed (toxic) assets of the largest banks being supported by a guarantee scheme through the Asset Protection Agency (APA). The FSA adopted a strengthened remuneration Code as part of its Handbook of Rules and Guidance. The Coalition Government has transformed the earlier Labour Administration one-year bonus tax into a permanent Bank levy generating around £2.5 billion per year.<sup>189</sup> The Government has also been in discussion with the banks to ensure their adherence to its Code of Practice on Taxation, which promotes strong governance in this area and adopts a preventative approach to tax avoidance. Fifteen of the major U.K. banks had agreed to support the Code by November 2010.<sup>190</sup>

These are important initiatives in attempting to ensure that the finance industry supports growth in the wider economy with higher standards of disclosure and best practice being adopted in certain key areas including remuneration, which will improve the rela-

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183. *Id.* at 8-9.

184. *Id.*

185. *Id.* at 8.

186. *Id.* at 9.

187. *Id.*

188. *Id.* ¶ 1.7.

189. See ANTONY SEELY, HOUSE OF COMMONS LIBRARY, PUB. SN05251, TAXATION OF BANKING, at 14 (Apr. 11, 2012), available at <http://www.parliament.uk/briefing-papers/SN05251>.

190. See Press Release, HM Treasury, Top 15 Banks Sign Code of Practice (Nov. 30, 2010) (U.K.), [http://www.hm-treasury.gov.uk/press\\_66\\_10.htm](http://www.hm-treasury.gov.uk/press_66_10.htm).



tionship between the public and financial firms. These initiatives are considered in further detail below.

#### A. U.K. FINANCIAL INVESTMENTS (UKFI) AND THE ASSET PROTECTION AGENCY (APA)

During the most severe part of the financial crisis in autumn 2008, the Government was forced to support the major U.K. banks and financial markets following the collapse in global and U.K. stock market prices. Prime Minister Gordon Brown and the then Chancellor Alistair Darling announced a three-part package of measures on October 8, 2008 which involved providing up to £50 billion bank recapitalization, £250 billion of wholesale funding guarantees, and a doubling of market liquidity to £200bn under the Bank of England's Special Liquidity Scheme (SLS).<sup>191</sup> Nineteen billion pounds were subsequently made available to RBS, £12 billion to Halifax Bank of Scotland (HBOS), and £5 billion to Lloyds TSB through the U.K. Bank Recapitalization Fund (BRF).<sup>192</sup> While other major banks were able raise capital from the markets, further funds had subsequently to be made available to the new Lloyds Banking Group (LBG following the merger of Lloyds TSB and HBOS) and RBS, which received £45 billion in total. The Government effectively assumed an 84 percent interest in RBS and a 43 percent interest in LBG.<sup>193</sup> Special competition dispensation had to be provided to create LBG due to its acquisition of 32 percent of the U.K. mortgage market.<sup>194</sup> The Government's investment in RBS and LBG are held through U.K. Financial Investments (UKFI) Limited, which was set up on November 31, 2008.<sup>195</sup>

The Government was forced to set up a separate asset support scheme in January 2009 following continued volatility in the markets. The Troubled Asset Restructuring Program (TARP) had been approved in the United States in October 2008, which provided for the purchase of distressed (toxic) assets from major U.S. banks and other financial groups.<sup>196</sup> While the first tranche of the TARP was used to provide additional capital for banks on a U.K. model, the provision of some form of asset support was considered in other countries. The Labour Administration in the United Kingdom decided to establish an insurance, rather than purchase, scheme that provided for public guarantees to be provided to cover possible losses on distressed assets retained on bank balance sheets. The new Asset

191. See Alistair Darling, Chancellor of the Exchequer, Statement to the House of Commons on Financial Stability (Oct. 8, 2008) (U.K.), *available at* [http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/statement\\_chx\\_081008.htm](http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/statement_chx_081008.htm).

192. See Alistair Darling, Chancellor of the Exchequer, Statement to the House of Commons on Financial Markets (Oct. 13, 2008), *available at* [http://www.hm-treasury.gov.uk/statement\\_chx\\_13\\_10\\_08.htm](http://www.hm-treasury.gov.uk/statement_chx_13_10_08.htm); U.K. FIN. INVS. LTD, UPDATES OF UKFI MARKET INVESTMENTS 8 (Mar. 2010), *available at* <http://www.ukfi.co.uk/publications/>.

193. SCOTTISH AFFAIRS COMMITTEE, BANKING IN SCOTLAND, 2009-10, H.C. 70-I, at 10 (U.K.); UPDATES OF UKFI, *supra* note 192, at 8.

194. See OFFICE OF FAIR TRADING, ANTICIPATED ACQUISITION BY LLOYDS TSB PLC OF HBOS PLC 96, 113 (Oct. 24, 2008) (U.K.), [http://www.offt.gov.uk/shared\\_offt/press\\_release\\_attachments/Lloydstsb.pdf](http://www.offt.gov.uk/shared_offt/press_release_attachments/Lloydstsb.pdf).

195. See *What We Do*, U.K. FIN. INVS. LTD, <http://www.ukfi.co.uk/about-us/what-we-do/> (last visited Oct. 7, 2012).

196. The TARP was intended to provide for the purchase of US\$700 billion of mortgage-backed securities and preferred stock from banks under the Emergency Economic Stabilization Act of 2008. See *generally* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (enacted Oct. 3, 2008).

Protection Scheme (APS) was managed by the Asset Protection Agency (APA) that was established as an Executive Agency of the Treasury.<sup>197</sup>

The objectives of the APS are to support the stability of the U.K. financial system, to increase confidence and capacity to lend, and to support the economy by protecting participating financial institutions against exceptional credit losses on agreed asset portfolios.<sup>198</sup> The overriding objective of the APA is to protect taxpayers' interests with its functions and responsibilities being set out in a Framework Document.<sup>199</sup> The APA operates with a small permanent staff and relies on the operational cooperation of RBS, which was initially the sole participating bank. The APA Chief Executive is supported by an Advisory Board. The APA is legally part of the Treasury, although it operates on an arm's length basis as a separate executive agency.

The APA provides protection against future credit losses on defined asset portfolios in exchange for a fee. The APA provides protection against £282 billion of "Covered Assets" held by RBS. RBS accepted an initial uncovered First Loss Amount of £60 billion, with the Treasury paying 90 percent of any excess in the event of a "Trigger" event, including failure to pay, bankruptcy, or restructuring.<sup>200</sup> RBS will have to pay £700 million per year in fees for three years and then £500 million per year until 2099 in the event of no prior disposal.<sup>201</sup> RBS has to cooperate with the APA in ensuring that the assets covered are managed and administered in accordance with the Asset Management Objective (AMO), which is to maximize expected net present value (NPV) and minimize losses.

## B. REMUNERATION CODE

The issue of remuneration was considered by the FSA at an early stage during the crisis with a draft Remuneration Code being issued in 2009 and then further revised in 2010 under relevant E.U. rules that took effect on January 1, 2011.<sup>202</sup> The FSA Code specifies a general requirement that remuneration policies must promote effective risk management with twelve more specific key principles in designing acceptable bonus packages for banks.<sup>203</sup> The issue of Corporate Governance in U.K. banking was also considered by a separate review committee under Sir David Walker, former Executive Director of the

197. See *Asset Protection Agency*, HM TREASURY, <http://www.hm-treasury.gov.uk/apa.htm> (last visited Oct. 6, 2012) (U.K.).

198. See ASSET PROTECTION AGENCY, ANNUAL REPORT AND ACCOUNTS 2009-10, 2009-10, H.C. 259, ¶ 2.1 (U.K.), available at [http://www.hm-treasury.gov.uk/d/apa\\_annual\\_report\\_0910.pdf](http://www.hm-treasury.gov.uk/d/apa_annual_report_0910.pdf).

199. See Asset Protection Agency, *Asset Protection Agency Framework Document*, HM TREASURY, [http://www.hm-treasury.gov.uk/d/apa\\_framework\\_document.pdf](http://www.hm-treasury.gov.uk/d/apa_framework_document.pdf) (last visited Oct. 6, 2012) (U.K.).

200. ANNUAL REPORT AND ACCOUNTS 2009-10, *supra* note 198, at 21.

201. *Id.* at 32.

202. See FSA HANDBOOK, *supra* note 9, § 19A.1.3. See generally FSA, PUB. CP09/01, REFORMING REMUNERATION PRACTICES IN FINANCIAL SERVICES (Mar. 2009) (U.K.); FSA, PUB. PS09/15, REFORMING REMUNERATION PRACTICES IN FINANCIAL SERVICES, FEEDBACK ON CP09/10 AND FINAL RULES (Aug. 2009) (U.K.). On the late amendments, see FSA, PUB. CP10/19, REVISING THE REMUNERATION CODE (July 2010) (U.K.); FSA, PUB. PS10/20, REVISING THE REMUNERATION CODE, FEEDBACK ON CP10/19 AND FINAL RULES (Dec. 2010) (U.K.); FSA, PUB. CP10/27, IMPLEMENTING CRD3 REQUIREMENTS ON THE DISCLOSURE OF REMUNERATION (Nov. 2010) (U.K.); FSA, PUB. PS10/21, IMPLEMENTING CRD3 REQUIREMENTS ON THE DISCLOSURE OF REMUNERATION (Dec. 2010) (U.K.).

203. See FSA HANDBOOK, *supra* note 9, § 19A.2.1, .3(3).

Bank of England.<sup>204</sup> The Walker Committee produced its final Review in July 2009,<sup>205</sup> which identified five key themes and set out thirty-nine recommendations to strengthen governance, organization and practice within financial institutions.<sup>206</sup> The application of equivalent recommendations to non-financial firms was considered separately by Sir Christopher Hogg, Chairman of the Financial Report Council (FRC) that was examining the application of the U.K. Combined Code on Corporate Governance for all listed companies in the United Kingdom.<sup>207</sup>

Remuneration raises difficult and sensitive issues in public and private companies. Directors and managers should be properly incentivized and rewarded, provided that this does not distort risk taking and the fair distribution of profit within firms, including between staff and shareholders. Certain distortive elements had been allowed to be included within individual payment packages and especially with many calculations being carried out on a gross rather than a net earnings basis and with bonus payments being guaranteed. Much of this has since been corrected through the FSA Remuneration Code, which represents an intelligent and balanced package of designed guidelines. Larger governance structures have also been strengthened following the recommendations of the Walker Committee Review.

### C. BANK LEVY

The Labour Administration in the U.K. announced in the 2009 Pre-Budget Report that a temporary Bank Payroll Tax would be imposed on bankers' bonuses of 50 percent over £25,000 (equivalent to a 33.3 percent income tax).<sup>208</sup> The Government had acquired an 84 percent stake in RBS and 43 percent stake in LBG, which made the high bonus payments announced politically sensitive.<sup>209</sup> The temporary tax appeared to represent an intelligent compromise position while major financial groups remained within Government ownership. While some staff were transferred, or asked to be transferred, abroad to avoid the tax, many of the major institutions decided to pay amounts equal to the tax to retain key staff. The estimated income was approximately £3 billion.<sup>210</sup> The Coalition Government later announced that they would replace the temporary tax with a permanent Bank Levy on U.K. bank balances and building societies starting on January 2011. This was justified based on the need for banks to contribute to the supposed costs of the support that they received from the Government on an implied basis rather than to limit bonus payments directly.

204. See Press Release, HM Treasury, *Indep. Review of Corporate Governance of UK Banking Indus.* (Feb. 9, 2009) (U.K.), [http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/press\\_10\\_09.htm](http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/press_10_09.htm).

205. See DAVID WALKER, *A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES* 8-18 (July 16, 2009).

206. See *id.* at 10-18 (including recommendations related to board size, composition and qualification, board function and evaluation of performance, institutional shareholder role, communication and engagement, risk governance, and remuneration).

207. See FIN. REPORTING COUNCIL, *2009 REVIEW OF THE COMBINED CODE: FINAL REPORT* 11 (Dec. 2009).

208. See Seely, *supra* note 189, at 1, 6.

209. *BANKING IN SCOTLAND*, *supra* note 193, at 10; *UPDATES OF UFKI*, *supra* note 192, at 8.

210. HM REVENUE & CUSTOMS, *BANK LEVY—TECHNICAL NOTE* 10 (Dec. 9, 2012) (U.K.), <http://www.hmrc.gov.uk/drafts/tn-bank-levy.pdf>.

The permanent Bank Levy was confirmed in the June 2010 Budget. A consultation document was issued on July 13, 2010 with a response document on October 21, 2010 to which was attached initial draft legislation.<sup>211</sup> The levy would be included as a Schedule to the Finance Bill (No. 3) for 2010.<sup>212</sup> The levy would be based on total chargeable equity and liabilities as reported on the relevant balance sheets of the banks and banking and building society groups affected. This would operate on a balance sheet model above £20 billion.<sup>213</sup> The levy was set at a rate of 0.05 percent for 2011 and 0.075 percent for 2012.<sup>214</sup> The levy would be charged through existing corporation tax using the Quarterly Installment Payments (QIPs) system.

The Government argued that the levy was based on that proposed by the IMF in its Report to the G20 titled *A Fair and Substantial Contribution by the Financial Sector* in June 2010.<sup>215</sup> This discussed the possible creation of three new charges with a Financial Stability Contribution (FSC or bank tax), a Financial Activities Tax (FAT), and a Financial Transaction Tax (FTT).<sup>216</sup> The U.S. Obama Administration proposed a Financial Crisis Responsibility Fee of \$90 billion over ten years on U.S. banks with assets of more than \$50 billion.<sup>217</sup> The U.K. bank levy was claimed to be justified based on the perceived need to ensure that the banking sector makes a fair contribution that reflects the risks they pose to the financial system and wider economy.<sup>218</sup>

The proper justification for a bank levy remains unclear.<sup>219</sup> A levy, or FSC, only reflects the Government's potential contingent liabilities to support the financial system in the event of an extreme crisis that will exist in any case. This arguably also simply reflects the benefits that society receives from the financial industry in terms of the functions

211. See HM TREASURY, BANK LEVY: A CONSULTATION (July 2010) (U.K.), [http://www.hm-treasury.gov.uk/consult\\_bank\\_levy.htm](http://www.hm-treasury.gov.uk/consult_bank_levy.htm); see also *Government Publishes Final Legislation on the Bank Levy*, HM TREASURY (Dec. 9, 2009) (U.K.), [http://www.hm-treasury.gov.uk/press\\_70\\_10.htm](http://www.hm-treasury.gov.uk/press_70_10.htm).

212. See *Draft Legislation: Bank Levy*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/drafts/bank-levy.pdf> (last visited Oct. 7, 2012) (U.K.). The Schedule extends to seventy-nine paragraphs with nine Parts, consisting of: Introduction (Part 1), Charging of Bank Levy (Part 2), Groups covered by the Bank Levy (Part 3), Chargeable equity and liabilities (Part 4), Supplementary provision (Part 5), Collection and management (Part 6), Double taxation relief (Part 7), Definitions (Part 8), and Power to make consequential changes (Part 9). *Id.*; BANK LEVY—TECHNICAL NOTE, *supra* note 210, at 3.

213. BANK LEVY—TECHNICAL NOTE, *supra* note 210, at 5.

214. *Id.*

215. See BANK LEVY: A CONSULTATION, *supra* note 211, ¶ 3.2 (discussing Int'l Monetary Fund [IMF], *A Fair and Substantial Contribution by the Financial Sector, Final Report for the G-20* (June 2010), available at <http://www.imf.org/external/np/g20/pdf/062710b.pdf>).

216. See *A Fair and Substantial Contribution*, *supra* note 215, at 7. The FSC could be imposed on liabilities or assets or both at either a flat or variable rate. *Id.* The FAT would be imposed on bank profits and remuneration taxes. *Id.* The FTT could be imposed on a defined range of financial instruments or transactions including currency positions, stocks, bonds and financial derivatives. *Id.* at 19. The FTT constitutes a form of 'Tobin tax' as originally proposed by The Economist Tobin. *Id.* The FTT had been supported by the German Government at the November 2009 G20 Financial Ministers meeting in Scotland, although this was rejected. See *id.* at 19-21.

217. *Id.* at 7.

218. See BANK LEVY: A CONSULTATION, *supra* note 211, ¶ 1.7. "The Levy is intended to ensure that banks make a contribution that reflects the potential risk to the [U.K.] financial system and wider economy from bank failures and consequent loss of consumer and investor confidence." *Id.* ¶ 1.8.

219. *IMF Bank Tax Proposals Cause Controversy*, BRETTON WOODS PROJECT (June 17, 2010), <http://www.brettonwoodsproject.org/art-566355>. See also Richard T Page, *Foolish Revenge or Shrewd Regulation? Financial-Industry Tax Law Reforms Proposed in the Wake of the Financial Crisis?*, 85 TUL. L. REV. 191, 193 (2010).

carried out. Unless the levy is used to fund a resolution mechanism or otherwise prevent crises or support crisis management, it cannot be considered to improve financial stability as such. It otherwise only constitutes an alternative form of a business or corporation taxation.

#### D. PROJECT MERLIN

The Government announced the conclusion of negotiations over Project Merlin on February 9, 2011 after an extended negotiation period.<sup>220</sup> A separate statement was issued by Barclays, HSBC, LBG, and RBS collectively on February 9, 2011.<sup>221</sup> The objective was to secure a commitment to increase lending to businesses and, in particular, small and medium sized enterprises (SMEs) from £179 billion in 2010 to £190 billion in 2011.<sup>222</sup> Seventy-six billion pounds would be made available to SMEs directly, which represented a 15 percent increase from 2010.<sup>223</sup> The Bank of England would monitor the banks' aggregate gross new lending with the results being published on a quarterly basis. Aggregate bonus pools would also be reduced from 2009 with the bonuses paid to the five highest paid senior executive officers being published annually on an unnamed basis. Additional support of around £1.2 billion would be made available to support regional growth with £200 million being provided over two years to assist set up the Government's proposed "Big Society Bank."<sup>224</sup> The Treasury considered that the measures constituted a demonstration by the banks of their social responsibility and support for U.K. businesses.

In entering into the agreement, the banks stated that they "explicitly [recognized] their responsibility to support economic recovery" with key commitments on lending, tax, pay, and other economic contributions.<sup>225</sup> Corresponding undertakings were nevertheless expected from the Government. The banks expected a commitment by the Government to "the [stabilization] and improvement of the relationship between the Government and the banks" as well as "the creation of a level playing field internationally for [U.K.] banks" (consistent with G20 commitments) and the acceptance of the "right of self-determination by bank boards" subject to increased shareholder engagement.<sup>226</sup> The objective was to reverse the continuing anti-financial sector "bank bashing" position adopted by the Government and its use of this position for political and media advantage.<sup>227</sup>

220. Press Release, HM Treasury, Gov't Welcomes Banks' Statements on Lending 15% More to SMEs, and on Pay and Support for Reg'l Growth (Feb. 9, 2011) (U.K.), [http://www.hm-treasury.gov.uk/press\\_17\\_11.htm](http://www.hm-treasury.gov.uk/press_17_11.htm).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Barclays et. al., *Project Merlin—Banks' Statement*, HM TREASURY 1 (Feb. 9, 2011), [http://www.hm-treasury.gov.uk/d/bank\\_agreement\\_090211.pdf](http://www.hm-treasury.gov.uk/d/bank_agreement_090211.pdf).

226. *Id.*

227. Richard Fletcher, *Let's Hope Merlin Casts a Powerful Enough Spell to Banish Bank Bashing*, THE TELEGRAPH (Feb. 10, 2011, 6:00 AM), <http://www.telegraph.co.uk/finance/comment/richardfletcher/8314905/Lets-hope-Merlin-casts-a-powerful-enough-spell-to-banish-bank-bashing.html>.

## E. CODE OF PRACTICE ON TAXATION

The major U.K. banks further agreed to comply with HMRC's *Code of Practice on Taxation for Banks* under their February 2011 Project Merlin Statement.<sup>228</sup> The purpose of the Code was to encourage banks to adopt certain best practices with regard to taxation management.<sup>229</sup> Banks may undertake appropriate tax planning to support their business needs, although they should not engage in tax avoidance.<sup>230</sup> The Chancellor expressed the Government's commitment to ensuring that the banking sector maintained strong governance on taxation with banks adhering to the Code by November 2010.<sup>231</sup> Fifteen major U.K. banks confirmed their adherence to the Code.

## IX. U.K. Regulatory Comments and Conclusions

A substantial amount of regulatory reform has been announced in the United Kingdom since the General Election in May 2010. Much of this has been more institutional and structural rather than substance based until now. In institutional terms, the role and function of the Bank of England has been strengthened further with the establishment of the separate FPC and PRA within the Bank Group, as well as with the creation of the FCA as a separate independent agency. Some structural separation has also been proposed by the ICB with the creation of retail ring-fences within the larger banks and groups.

These reforms have also been brought forward as part of a larger policy framework that includes a continuing bank investment program, bank levy and bank lending arrangements, and strengthened requirements on bank bonuses and remuneration. Supervisory approach has also been made more interventionist with arrangements having to be made to implement Basel III and other international and European reform agenda in the United Kingdom.

The following more specific comments and conclusions may be drawn on the most recent U.K. reforms at this time.

## A. CRISIS REACTION AND OPPORTUNITY

The outgoing Labour Administration had already brought forward a number of initiatives in response to the emerging financial crisis and subsequent events. The crisis in the United Kingdom was principally contained with the announcement of the U.K. three-point plan produced by Prime Minister Gordon Brown and the then Chancellor Alistair Darling on October 8, 2008 that involved up to £50 billion bank recapitalization, £250 billion of wholesale funding guarantees, and a doubling of market liquidity to £200 billion under the Bank of England's Special Liquidity Scheme (SLS).<sup>232</sup> The Government had separately supported the merger of Lloyds TSB and HBOS on September 17, 2008 and had set up in early 2009 a distressed (toxic) asset guarantee scheme based on insuring

228. *Project Merlin—Banks' Statement*, *supra* note 225, at 3.

229. HM REVENUE & CUSTOMS, CODE OF PRACTICE ON TAXATION FOR BANKS 19 (June 2009).

230. *Id.* at 15.

231. HM TREASURY, SPENDING REVIEW, 2010, Cm. 7942, at 30 (U.K.).

232. Statement of Alistair Darling, *supra* note 191.

assets on the balance sheets of the banks in return for a fee rather than outright asset purchases as proposed by the original TARP in the United States.<sup>233</sup>

The Labour Administration established a comprehensive Special Resolution Regime (SRR) that included private bank transfer, bridge bank transfer, and public acquisition (or nationalization) options, as well as a separate special Bank Administration Procedure (BAP) and Bank Insolvency Procedure (BIP) under the Banking Act 2009 which also created the CFS.<sup>234</sup> A number of other reforms were introduced under the Financial Services Act 2010, which included confirming an express financial stability objective for the Bank of England.<sup>235</sup> The FSA had adopted a separate Supervisory Enhancement Program (SEP) following its investigation into the collapse of Northern Rock and had incorporated a considerably strengthened Remuneration Code within its Handbook.<sup>236</sup> It had also produced its own considerably more onerous liquidity proposals, than those proposed by the Basel Committee under Basel III, with the Government committing to implement the higher capital requirements proposed by the ICB than would be adopted under the E.U. CRD IV in Europe or Basel III globally.<sup>237</sup>

It is arguable that the reforms already adopted in advance of the May 2010 election may have been sufficient to contain and respond to any future crises. The new Coalition Government nevertheless took the opportunity to strengthen these measures again with further institutional reforms and announced the replacement of the CFS with the FPC within the Bank of England and of the FSA with the PRA and FCA.<sup>238</sup> The effect of this has been to create a new central-bank-based macro-prudential model with the regulatory delegation of non-systemic functions to an external agency. A more aggressive and interventionist supervisory approach and culture would also be adopted, although much of this had already been put in place by the FSA with its SEP, new product design regime, and credible enforcement program. While many of these reforms were directed at financial stability, they were also to a significant extent politically driven.

## B. TWIN PEAKS

The new U.K. system has been described as being based on the “Twin Peaks” model as discussed in earlier literature and as adopted with some amendment in Australia following the Wallis Commission Report.<sup>239</sup> The new U.K. regime was nevertheless initially “Tri or Tripled Peaked” with the creation of a separate prudential agency (the PRA), the original

233. See *supra* note 196.

234. *Special Resolution*, BANK ENG., [http://www.bankofengland.co.uk/financialstability/Pages/role/risk\\_reduction/srr/default.aspx](http://www.bankofengland.co.uk/financialstability/Pages/role/risk_reduction/srr/default.aspx) (last visited Oct. 7, 2012).

235. Financial Services Act 2010, cl. 1 (U.K.).

236. FSA, THE FSA'S SUPERVISORY ENHANCEMENT PROGRAMME, IN RESPONSE TO THE INTERNAL AUDIT REPORT ON SUPERVISION OF NORTHERN ROCK 1 (Mar. 26, 2008) (U.K.), <http://www.fsa.gov.uk/pubs/other/enhancement.pdf>; FSA HANDBOOK, *supra* note 9, ch. 19A (Remuneration Code).

237. See FSA, PUB. CP09/13, STRENGTHENING LIQUIDITY STANDARDS 2: LIQUIDITY REPORTING (Apr. 2009) (U.K.), [http://www.fsa.gov.uk/pubs/cp/cp09\\_13.pdf](http://www.fsa.gov.uk/pubs/cp/cp09_13.pdf); FSA, PUB. CP08/22, STRENGTHENING LIQUIDITY STANDARDS (Dec. 2008) (U.K.), [http://www.fsa.gov.uk/pubs/cp/cp08\\_22.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_22.pdf); FSA, PUB. DP07/7, REVIEW OF THE LIQUIDITY REQUIREMENTS FOR BANKS AND BUILDING SOCIETIES (Dec. 2007) (U.K.), [http://www.fsa.gov.uk/pubs/discussion/dp07\\_07.pdf](http://www.fsa.gov.uk/pubs/discussion/dp07_07.pdf).

238. *What Does Regulatory Reform Mean for Your Business?*, FSA, [http://www.fsa.gov.uk/about/what/reg\\_reform](http://www.fsa.gov.uk/about/what/reg_reform) (last visited Oct. 7, 2012) (U.K.).

239. See FIN. SYS. INQUIRY, COMM. UNDER STAN WALLIS, FINAL REPORT (Mar. 1997) (Aus.).

Consumer Protection and Markets Authority (CPMA, later renamed the FCA), and a separate financial enforcement authority.<sup>240</sup> The Government subsequently decided to abandon the third agency and retain financial crime within the FCA, which would also be responsible for consumer protection and stock market and exchange oversight.<sup>241</sup> Macro-prudential policies are also now dealt with through the FPC, with prudential and conduct regulation being managed by the PRA and FCA.<sup>242</sup> While the FPC and PRA are still within the larger Bank Group, the U.K. model is essentially still tripartite or, at least, only partially twin peaks based.

The advantage of this model is that it creates a much stronger and more effective core macro-prudential function at the same time as a single set of decision making, responsibility, and accountability lines within the central bank, which is responsible for monetary, regulatory, and wider market oversight policy. Splitting prudential and conduct functions is also intended to allow each to be carried out in a more specialized and dedicated manner, although this could possibly have been dealt with by having separate teams or divisions within the FSA. The difficulty that would have arisen in this case is that the Bank of England would then have been administratively and operationally overloaded if it had become responsible for monetary, regulatory, and macro-prudential, as well as payment and market infrastructure, policy. It was for this reason that the decision was made to transfer non-core systemic functions to the FCA. While some systemic concerns may still arise with regard to markets and exchanges under FCA oversight, a functional compromise had to be achieved in dividing respective regulatory functions between the PRA and FCA.

The unfortunate, but inevitable, consequence of splitting previously integrated regulatory functions between two agencies means that a number of additional institutional, administrative, and operational compromises have had to be adopted, making the underlying legislative framework considerably more complex. A substantial amount of negotiation effort, for example, within the Treasury Select Committee and Joint Parliamentary Committee had focused on ascribing the correct functions to each agency and ensuring that they operate in a complementary and supportive manner. Effective exchange of information and coordination arrangements have also had to be designed with two further Memoranda of Understanding (MoU) having to be drafted.<sup>243</sup> A considerable amount of daily operational overlap will occur in practice with inevitable policy conflicts and contradictions arising. A further unintended consequence has been the remuneration in dividing responsibility between the PRA and FCA for representation on various European and international committees where their own functions and mandates overlap. This will require considerable care and attention in practice.

240. *Reform and Regulation: The Government's Approach to Financial Services Regulation*, HM TREASURY, [http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/reform\\_and\\_regulation.htm](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/reform_and_regulation.htm) (last visited Oct. 7, 2012) (U.K.).

241. *Regulatory Reform – Background*, FSA, [http://www.fsa.gov.uk/about/what/reg\\_reform/background](http://www.fsa.gov.uk/about/what/reg_reform/background) (last visited Oct. 7, 2012) (U.K.).

242. HM TREASURY, *NEW APPROACH TO FINANCIAL REGULATION, BUILDING A BETTER SYSTEM*, 2011, Cm. 1805 (U.K.).

243. Memorandum of Understanding from FSA and HMRC for the Exchange of Information and Conducting of Joint Visits Under the Money Laundering Regulations 2007 and Payment Services Regulations 2009 (June 1, 2012) (U.K.), available at <http://www.fsa.gov.uk/static/pubs/mou/fsa-hmrc.pdf>.



### C. FINANCIAL STABILITY

The new U.K. model has been designed to create a central bank based macro-prudential model. The advantage is that core systemic and financial system policies and functions will be centered within the central bank. The Bank will then be responsible for monetary, regulatory, and macro-prudential, as well as payment systems and infrastructure, policies. The evident danger is that conflicts may arise between the policies, although their centralization within a single institution may allow for speedier and more effective resolution and reconciliation. This centralization of authority has also necessitated the establishment of strengthened internal governance and external oversight and accountability arrangements to ensure that the Bank is capable of discharging its several functions in a proper, balanced, independent, informed, and effective manner.

The Coalition Government had criticized the earlier tripartite system for resulting in confusion of the roles and ultimate decision-taking responsibility of the Treasury, Bank of England, and FSA with each having equal status. It is arguable that the functions of the three separate agencies were already sufficiently clear under the earlier MoU that was entered into between them in 1998 and revised in 2006 and that any decision errors during the crisis were more to do with timing, complexity, or simply individual personalities rather than with the nature of the underlying committee mechanism itself.<sup>244</sup> The danger of the new regime is that the earlier balance between the three agencies has been removed with an over-centralization of authority in the Bank. It was principally for this reason that the Bill has been amended to confer on the Chancellor a statutory right to issue directions to the Bank in the event of another major crisis, with the relationship between the Treasury and Bank still being governed by a new MoU on Crisis Management. The new policy would accordingly appear to amount more to one of “institutional and operational substitution” rather than clear and quantifiable “replacement or improvement.” Much will depend on how this is implemented and operates in practice and, in particular, under the new MoU to be adopted.

### D. MACRO-PRUDENTIAL OVERSIGHT

The recent crises in financial markets drew clear attention to the failure in most countries to monitor wider threats to market and systems stability. Risks and exposures were allowed to build up in parts of the retail and wholesale markets that were not properly supervised or regulated. Regulators claimed, in retrospect, that they were only responsible for the micro-institutional supervision of firms on an individual or solo basis while central banks argued that they had no express authority or tools to deal with the wider macro-prudential risks that they had already identified. A number of initiatives have since been adopted to construct new macro-prudential regimes, such as with the FPC in the United Kingdom, the Financial Stability Oversight Counsel (FSOC) set up under the

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244. Memorandum of Understanding Between HM Treasury, The Bank of England, and The Financial Services Authority (Mar. 26, 2006) (U.K.), *available at* <http://www.fsa.gov.uk/library/communication/pr/2006/025.shtml>.

Dodd-Frank Act in the United States,<sup>245</sup> and European Systemic Risk Board (ESRB) in the European Union.<sup>246</sup>

These are important initiatives although significant difficulties remain with regard to constructing an effective macro-prudential function in practice. Initial problems arise in defining “financial stability” and “financial instability,” as well as the appropriate tests for intervention, and in identifying the necessary data and information that has to be properly collected, examined, and assessed. Where risks can be properly isolated, measured, and assessed, further problems arise in agreeing on the necessary tools to apply.<sup>247</sup> Existing proposals, in particular, in the advanced economies have unfortunately often simply tended to focus on raising capital adequacy further beyond existing Basel III levels, which may only constrain bank lending and underlying market function disproportionately.<sup>248</sup>

It has also often been assumed that the new macro-prudential agent should have direct regulatory powers and authority. Effective macro-prudential function will nevertheless involve monitoring a range of policies including monetary, regulatory, consumer protection, competition, and fiscal and economic policies together. Where an exposure arises in a particular policy area, it may be more effective to have any specific response dealt with by the particular agency concerned. The focus should possibly then be on macro-prudential “oversight” or supervision rather than direct regulation with macro-prudential control or regulation being dealt with on a delegated rather than direct basis.

The effectiveness of the macro-prudential oversight undertaken may, in practice, ultimately be dependent on the quality of the day-to-day information collection and assessment undertaken and supporting inter-agency cooperation and coordination secured. The Bank of England had a separate Financial Policy division, or wing, before the crisis, and this is to be strengthened with the transfer of equivalent monitoring activities from the FSA.<sup>249</sup> The FSOC in the United States will be supported by the Office for Financial Research (OFR) within the Treasury, which will retain its own Data Center and Research and Analysis Center.<sup>250</sup> Separate work has already been undertaken in identifying possible relevant data models, or matrices, that may be used.<sup>251</sup> Domestic efforts will also have to be coordinated with other cross-border systems, such as with the separate new financial committee set up in the European Union with the European Banking Authority (EBA), European Markets and Securities Authority (EMSA), and European Insurance and Occupational Pension Authority (EIOPA), as well as with the IMF, BIS, and FSB at the international levels.

245. Dodd-Frank Wall Street and Consumer Protection Act, Pub. L. No. 111-203, § 111, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5321(a)); see also DEPT. OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (June 17, 2009), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=2cbde5d4-68ea-4c48-8121-9cc4fa1f2901](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2cbde5d4-68ea-4c48-8121-9cc4fa1f2901).

246. *Proposal for a Regulation of the European Parliament and of the Council on Community Macro-Prudential Oversight of the Financial System and Establishing of a European Systemic Risk Board*, at 3, COM (2009) 499 final (Sept. 23, 2009).

247. See e.g., BANK OF ENG., INSTRUMENTS OF MACROPRUDENTIAL POLICY (Dec. 2011), available at <http://www.bankofengland.co.uk/publications/Documents/other/financialstability/discussionpaper111220.pdf>.

248. See e.g., BANK OF ENG., THE ROLE OF MACROPRUDENTIAL POLICY (Nov. 2009), available at <http://www.bankofengland.co.uk/publications/Pages/news/2009/111.aspx>.

249. *Reform and Regulation: The Government's Approach*, *supra* note 240.

250. 12 U.S.C. § 5322(a)(2)(A) (2006).

251. See e.g., Garry J. Schinasi, *Defining Financial Stability* (IMF, Working Paper No. WP/04/187, 2004).

### E. FINANCIAL SERVICES BILL

The 2011 Financial Services Bill will on enactment create the new statutory regime for financial regulation within the United Kingdom.<sup>252</sup> Rather than preparing a separate, clean, and integrated new statute, it was decided to proceed by way of statutory amendment of the earlier FSMA rather than new full statutory replacement.<sup>253</sup> This is unfortunate from a policy and access perspective in that the consolidated statute has become exceptionally more complex and difficult to follow.<sup>254</sup> This is also more politically questionable in that it suggests that the new regime is not as fundamentally revolutionary as claimed. This nevertheless only reflects the regulatory reality of the reforms adopted. These are essentially based on key aspects of institutional revision with some supervisory adjustment. While separate handbooks will be produced by the PRA and FCA, much of the substantive content of the earlier integrated regulatory regime may remain constant and in place.

As with the earlier FSMA, the Financial Services Bill is also largely constitutional in content because it specifies the functions of each of the key agencies involved and determines their respective powers and authority.<sup>255</sup> Almost all of this is achieved through amendments to the Bank of England Act 1998 and FSMA in Parts 1 and 2 of the Bill.<sup>256</sup> Inquiries and investigations are strengthened under Part 5 with the resolution regime under the Banking Act 2009 extended under Part 7.<sup>257</sup> The only new provisions are with regard to mutual funds in Part 3 and complaints in Part 6 with the Chancellor's powers of direction in Part 4, although again much of this simply provides statutory recognition for the early arrangements set out under the original tripartite MOU, albeit strengthened and clarified.<sup>258</sup>

### F. SUPERVISORY AND REGULATORY POLICY

The Treasury, Bank, and FSA have stressed the novelty of the new "regulatory approach" to be adopted by the PRA and FCA. This has been referred to in each of the Government's consultation papers and the recent joint regulatory approach statements issued. These documents set out the basis for a much more aggressive, interventionist, and determinist supervisory approach. This had been referred to in the Turner Report<sup>259</sup> and given effect under the FSA's SEP and credible deterrence enforcement policy,<sup>260</sup> with

252. See generally Financial Services Bill, 2010-12, H.C. Bill [278] (U.K.). The Financial Services Bill has subsequently been revised by both Houses of Parliament.

253. See generally *Consolidated Version of FSMA*, HM TREASURY (2012) (U.K.), [http://www.hm-treasury.gov.uk/d/consolidated\\_fsma\\_27022012.pdf](http://www.hm-treasury.gov.uk/d/consolidated_fsma_27022012.pdf) (illustrating changes proposed by the Financial Services Bill 2011).

254. See *id.*

255. See, e.g., Financial Services Bill, 2010-12, H.C. Bill [278] pt. 2, cl. 5 (U.K.)

256. See *id.* pts. 1, 2.

257. See *id.* pts. 5, 7.

258. See *id.* pts. 3-4, 6.

259. FSA, THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 88 (Mar. 2009) (U.K.), available at [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf).

260. See Margaret Cole, Dir. of Enforcement, FSA, Annual Financial Crime Conference: Delivering Credible Deterrence (Apr. 27, 2009), available at [http://www.fsa.gov.uk/library/communication/speeches/2009/0427\\_mcs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/0427_mcs.shtml); Hector Sants, Chief Exec., FSA, The Reuters Newsmakers Event: Delivering Intensive Su-

the FSA considerably increasing the severity of fines and penalties imposed since the crisis. The FSA had earlier introduced and expanded its More Principles Based Regulation (MPBR) approach using general principles rather than detailed rules.<sup>261</sup> The FSA has also produced new papers on such important policy matters as product regulation<sup>262</sup> and Treating Customers Fairly (TCF)<sup>263</sup> that have imposed additional new obligations on firms and raised their oversight functions. Outgoing FSA Chairman Hector Sants had also issued a number of speeches on the FSA adopting a more direct approach with regard to promoting appropriate regulatory culture, including the area of financial ethics.<sup>264</sup>

Before responsibility for bank supervision was transferred from the Bank of England to the FSA under the Bank of England Act 1998, the supervisory approach adopted was often described as being based on "moral suasion."<sup>265</sup> This relied on either the non-legal or non-statutory moral or market authority and reputation of the Bank.<sup>266</sup> The perceived advantages of this system were its informal contact and judgment or discretionary based nature. The idea of judgment and discretion has been re-used in the statements on the Bank's and PRA's new regulatory approach.<sup>267</sup> The new regulatory approach adopted accordingly represents a composite of the more-interventionist FSA and judgment based Bank approaches. All of this is to be welcomed, although it remains unclear how different this will be from the already revised supervisory and regulatory practices adopted by the FSA following the crisis and before its imminent dissolution.

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pervision and Credible Deterrence (Mar. 12, 2009), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2009/0312\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/0312_hs.shtml); *see also* Hector Sants, Chief Exec., FSA, Bloomberg: Intensive Supervision: Delivering the Best Outcomes (Nov. 9, 2009), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2009/1109\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/1109_hs.shtml).

261. *See* FSA, PRINCIPLES-BASED REGULATION: FOCUSING ON THE OUTCOMES THAT MATTER 4 (Apr. 2007) (U.K.), *available at* <http://www.fsa.gov.uk/pubs/other/principles.pdf>; *see also* Hector Sants, Chief Exec., FSA, Securities & Investments Institute Annual Conference: Principles Based Regulation: Lessons from the Sub-Prime Crisis (May 15, 2008), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2008/0515\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2008/0515_hs.shtml).

262. *See* FSA, PUB. DP 11/01, PRODUCT INTERVENTION 18 (Jan. 2011) (U.K.), *available at* [http://www.fsa.gov.uk/pubs/discussion/dp11\\_01.pdf](http://www.fsa.gov.uk/pubs/discussion/dp11_01.pdf); FSA, PUB. FS 11/03: PRODUCT INTERVENTION FEEDBACK ON DP 11/1, at 11, 16-17 (June 2011) (U.K.), *available at* [http://www.fsa.gov.uk/pubs/discussion/fs11\\_03.pdf](http://www.fsa.gov.uk/pubs/discussion/fs11_03.pdf).

263. *See* FSA, TREATING CUSTOMERS FAIRLY INITIATIVE: PROGRESS REPORT 3 (May 2007) (U.K.), *available at* [http://www.fsa.gov.uk/pubs/other/tcf\\_implementation.pdf](http://www.fsa.gov.uk/pubs/other/tcf_implementation.pdf); FSA, TREATING CUSTOMERS FAIRLY – TOWARDS FAIR OUTCOMES FOR CONSUMERS 11-13 (July 2006) (U.K.), *available at* [http://www.fsa.gov.uk/pubs/other/tcf\\_towards.pdf](http://www.fsa.gov.uk/pubs/other/tcf_towards.pdf).

264. *See* Hector Sants, Chief Exec., FSA, Mansion House Conference on Values and Trust: Can Culture be Regulated? (Oct. 4, 2010), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2010/1004\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2010/1004_hs.shtml); Hector Sants, Chief Exec., FSA, Chartered Institute of Securities and Investments Conference: Do Regulators Have a Role to Play in Judging Culture and Ethics? (June 17, 2010), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2010/0617\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2010/0617_hs.shtml); Hector Sants, Chief Exec., FSA, Securities & Investment Institute Conference 2009: The Regulator's Role in Judging Competence (May 7, 2009), *available at* [http://www.fsa.gov.uk/library/communication/speeches/2009/0507\\_hs.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/0507_hs.shtml).

265. *See* Vincent P. Polizatto, *Prudential Regulation and Banking Supervision: Building an Institutional Framework for Banks* 14 (The World Bank, Working Paper No. WPS 340, 1990).

266. *See id.*

267. BLUEPRINT FOR REFORM, *supra* note 3, at 7.

## G. RESOLUTION

A considerably strengthened resolution regime has been adopted in the United Kingdom under the Banking Act 2009.<sup>268</sup> This provided for the creation of three core new Special Resolution Regime (SRR) options with a private bank transfer, temporary “bridge” bank transfer (on a U.S. model), and public acquisition (nationalization).<sup>269</sup> The Act also amends the existing laws to create a separate special Bank Administration Procedure (BAP) and supporting Bank Insolvency Procedure (BIP).<sup>270</sup>

In practice, statutory special resolution will only work after banks’ and financial institutions’ own internal Restructuring and Recovery Plans or Programs (RRPs) have failed. All major financial institutions are being required to prepare internal contingency plans with RRP, which are often referred to “living wills” in the United Kingdom and European Union or “funeral plans” in the United States.<sup>271</sup> The FSB has issued a recent paper on the content of pre-crisis internal living wills and post-crisis resolution regimes that it collectively refers to as RRP.<sup>272</sup> The FSB has also issued a number of other papers strengthening supervisory oversight and the regulatory treatment of SIFIs and G-SIFIs.<sup>273</sup>

While “Too Big To Fail” remains an important problem in all countries and at the cross-border level, this should be of less significance going forward with the range of initiatives that have already been undertaken to strengthen risk management, increase capital, liquidity and leverage standards, and improve pre-crisis internal restructuring RRP and post-crisis resolution SRRs of major financial institutions and groups. This should substantially reduce the need for market support and fiscal bailouts.

## H. MARKET SUPPORT

While major crises should be limited through the range of mechanisms referred to, market support may still be required in the most extreme situations. The lack of effective specific support mechanisms may have been considered to have significantly aggravated key stages of the recent crisis. The Federal Reserve and Treasury claimed that they lacked the necessary authority to support Lehman Brothers in September 2008 while the Bank of England had earlier been advised that it could not provide covert support to Northern Rock following its request for emergency assistance in August 2007. A range of *ad hoc* measures had to be subsequently adopted during the crisis, especially in the United States. The Bank of England has issued one statement on this issue that refers to the need to have

268. See generally Banking Act 2009 (cl. 1) (U.K.).

269. See *id.* pt. 1, §§ 8-9.

270. See *id.* pt. 1, §§ 90-168.

271. See DELOITTE, POSITIONING FOR A NEW FINANCIAL LANDSCAPE: ROLLING OUT A RECOVERY AND RESOLUTION PLAN 2 (2010) (citing FINANCIAL STABILITY FORUM, FSF PRINCIPLES FOR CROSS-BORDER COOPERATION ON CRISIS MANAGEMENT (2009)).

272. See FSB, KEY ATTRIBUTE OF EFFECTIVE RESOLUTION REGIMES FOR FINANCIAL INSTITUTIONS, annex III (Oct. 2011) (U.K.).

273. See, e.g., FSB, POLICY MEASURES, *supra* note 93, at 1; FSB, EFFECTIVE RESOLUTION, *supra* note 93, at 7; FSB, FSB RECOMMENDATIONS AND TIME LINES, *supra* note 93, at 1-2; FSB, INTERIM REPORT TO G20 LEADERS, *supra* note 93. See also ASSESSMENT OF THE MACROECONOMIC IMPACT, *supra* note 93; GLOBAL SYSTEMICALLY IMPORTANT BANKS, *supra* note 93; Measures for Global Systemically Important Banks, *supra* note 93; GUIDANCE TO ASSESS THE SYSTEMIC IMPORTANCE OF FINANCIAL INSTITUTIONS, *supra* note 93; A COMMON DATA TEMPLATE, *supra* note 93, at 2.

appropriate mechanisms in place where necessary.<sup>274</sup> Care has to be exercised to ensure that markets realize that such mechanisms will only be used in the most extreme cases and on a discretionary basis to limit the dangers of moral hazard, excessive reliance, and risk-taking. The availability of such mechanisms will nevertheless always be important in reassuring markets and in preventing wider systemic contagion and collapse in the most extreme cases.

## I. COMPETITION AND STRUCTURAL REGULATION

The U.K. Government has been concerned with the need to increase consumer protection and competition following the crisis. It was for this reason that the ICB was established with both issues being examined on an independent and an authoritative basis. The Interim and Final Reports of the ICB made a number of recommendations with regard to improving regulation and increasing competition.<sup>275</sup> The ICB specifically proposed the adoption of retail ring-fencing in the United Kingdom, with ring-fenced activities also being supported by higher capital charges of around 10 percent and with other investment banking activities being left to be dealt with under relevant international Basel Committee standards.<sup>276</sup> The Commission has also recommended the further divestment of branches by the Lloyds Banking Group (LBG) that it considers to have grown too large following the merger of Lloyds TSB with HBOS.<sup>277</sup>

The Commission rejected any full separation of commercial and investment banking on an earlier U.S. Glass-Steagall model with the retail ring-fence representing an apparently intelligent compromise.<sup>278</sup> This will placate public and media calls for higher protection of retail functions without disproportionately undermining the competitive position of larger banks and complex groups. The idea of structural ring-fencing (or “functional isolation” or “functional separation”) is highly useful, although this may have been better used to protect all critical functions within all banks and not simply in respect of retail and SME customers. This may then have little effect in protecting financial stability in practice and may be considered to be more of a consumer protection measure while retail and SME customers have already been given higher deposit insurance protection payouts in any case. It may also have been more appropriate to apply the increased 10 percent charge to the higher-risk, non-retail, and investment banking activities, although this may still be absorbed within the total new Basel III capital framework within the proposed 0 to 2.5 percent counter-cyclical or 0 to 3 percent systemic risk charges.<sup>279</sup> Reasonable competition should also always be promoted in the financial area, although care has to be taken to ensure that markets do not become overly competitive with aggressive outliers reducing standards elsewhere, such as with the sale of subprime loans in the United States or offer-

274. See Paul Tucker, Deputy Governor of Fin. Stability, Bank of Eng., SUERF, CEPS and Belgian Financial Forum Conference: Crisis Management at the Cross-Roads: The Crisis Management Menu (Nov. 16, 2009), available at <http://www.bis.org/review/r091118d.pdf>.

275. See FINAL REPORT, *supra* note 8, at 10-11, 16; INTERIM REPORT, *supra* note 7, at 51-60.

276. See FINAL REPORT, *supra* note 8, at 10-11.

277. See *id.* at 16.

278. See *id.* at 66.

279. See BASEL COMMITTEE, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS 63-64 (June 1, 2011).

ing of exceptionally low loan-to-value (LTV) ratios and mortgage applications by Northern Rock in the United Kingdom.

#### J. WIDER FINANCIAL POLICY REFORM

The Government has undertaken a number of further policy initiatives to support long-term growth and contribution, including through its asset protection facility, independent bank shareholding, Bank Levy, Project Merlin lending support and bonus and remuneration commitments, and the Taxation Code.

The U.K. asset insurance facility, set up under its APA in 2009, represents an important model for managing distressed assets in other countries in the future. This allows the assets to remain on a bank's balance sheet, which avoids any difficulties in agreeing on disposal prices while the bank receives protection cover, reduces its regulatory capital obligations, and supports its share price. The U.K. scheme has also been successful in establishing a close operational relationship between the APA and the Royal Bank of Scotland (RBS), in particular, in monitoring and managing the £282 billion covered asset portfolio created for RBS.<sup>280</sup> This will assist to ensure that the manner in which the assets are managed, controlled, documented, and processed will be improved over time.

The agreement eventually reached on Project Merlin represented an intelligent and balanced compromise position between the banks and the Government that provided for the provision of reasonable credit, subject to market conditions, and executive pay commitments without undermining internal bank governance and autonomy. The Government has nevertheless since decided to replace this with the more direct £20 billion National Loan Guarantee Scheme.<sup>281</sup> Banks should have no difficulty in adhering to the Taxation Code, provided that this is not used by the tax authorities to impose substantial additional charges without proper due process and a clear legal basis.<sup>282</sup> More significant concerns arise with regard to the permanent Bank Levy, which does not support financial stability in any direct manner and arguably only constitutes a form of additional business or corporation tax. This also contributes to creating a larger climate of over re-regulation and penalty that may limit bank recovery and lending contrary to the Government's stated policy in this area.

The U.K. bank capitalization program assisted stabilizing the banks' financial positions as their share prices were falling. The Government principally purchased non-voting preferred stock that produced a reasonably generous return without interfering with the internal operations of the banks. These holdings were then managed through U.K. Investments that acted on an independent, arm's length basis. The Government's investment in the banks will be disposed when the share prices recover sufficiently to produce a reasonable profit or politically acceptable loss. Contradictions did arise in the management of the scheme with the Government being placed under considerable political pressure at the beginning of 2012 to use its 83 percent and 43 percent share positions in RBS

280. See FSA, *THE FAILURE OF THE ROYAL BANK OF SCOTLAND: FINANCIAL SERVICES AUTHORITY BOARD REPORT 11-12, 28-29* (Dec. 2011) (U.K.), available at <http://www.fsa.gov.uk/static/pubs/other/rbs.pdf> (on the difficulties surrounding the support of RBS in the United Kingdom).

281. See AUTUMN STATEMENT 2011, *supra* note 11, at 7.

282. See Megan Murphy et al., *Barclays Faces Block on Tax Schemes*, FIN. TIMES (Feb. 27, 2012, 8:55 PM), <http://www.ft.com/cms/s/0/aa810760-6173-11e1-94fa-00144feabdc0.html>.

and LBG, respectively, to limit bonus payments contrary to its non-interventionist and open-market principles.<sup>283</sup>

#### K. INTERNATIONAL AND E.U. POLICY IMPLEMENTATION

The United Kingdom will also implement all of the principal international regulatory reform and other E.U. measures adopted following the crisis. These principally include the Basel Committee's Basel III enhanced capital and new global liquidity and leverage requirements.<sup>284</sup> These will specifically be converted into relevant E.U. requirements, in particular, with the further revised Capital Requirements Directive (CRD IV), although a number of Member States attempted to dilute some of these provisions in advance of domestic implementation to favor local institutions.<sup>285</sup> A substantial number of other E.U. measures have also been adopted, or proposed, that will have to be implemented in the United Kingdom. These include the Alternative Investment Managers Directive (AIFMD), which created a new registration and oversight regime for hedge funds, and the Credit Rating Agency Regulation.<sup>286</sup> The earlier Markets in Financial Instruments Directive (MiFID) is being reviewed with the 2010 Market Infrastructure Regulation (EMIR), which includes measures to strengthen controls on over-the-counter (OTC) derivatives and credit default swaps, including through the use of Central Counterparties (CCPs).<sup>287</sup> The operation of the other core provisions is also being reconsidered, such as the Pro-

283. See Kate Burgess & Sharlene Goff, *RBS Director Defends Hester Bonus Award*, FIN. TIMES (Feb. 16, 2012, 9:52 PM), <http://www.ft.com/cms/s/0/89a6d49a-58bb-11e1-b9c6-00144feabdc0.html> (the Hester bonus was £963,000); Patrick Jenkins, *RBS Chairman Gives Up Share Bonus*, FIN. TIMES (Jan. 26, 2012, 4:02 PM), <http://www.ft.com/cms/s/0/fa30bae0-49c6-11e1-91b6-00144feabdc0.html>; Sharlene Goff, *Lloyds Chief Waives Right to Bonus*, FIN. TIMES (Jan. 13, 2012, 11:29 AM), <http://www.ft.com/cms/s/0/d04ee0f6-3dd4-11e1-91ba-00144feabdc0.html>; Amy Wilson, *Lloyds-HBOS will be 43pc Owned by the Government*, THE TELEGRAPH (Jan. 12, 2009, 7:45 AM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4220632/Lloyds-HBOS-will-be-43pc-owned-by-the-government.html>.

284. See A GLOBAL REGULATORY FRAMEWORK, *supra* note 279, at 2. Core Tier 1 capital (paid up share capital and retained earnings) is to be increased from 2 percent to 4.5 percent, with a conservation buffer of 2.5 percent, which increases the core Tier 1 ratio to 7 percent. *Id.* at 28, 69. A discretionary 0.0 to 2.5 percent counter-cyclical buffer is also to be applied with a further systemic risk buffer of approximately 2 percent to 3 percent for larger banks and financial groups. *Id.* at 58. A new 3 percent Tier 1 leverage ratio has also been introduced. *Id.* at 61. See BASEL COMM. ON BANKING SUPERVISION, BASEL III: INTERNATIONAL FRAMEWORK FOR LIQUIDITY RISK MEASUREMENT, STANDARDS AND MONITORING 1 (Dec. 2010).

285. See *Proposal for a Directive of the European Parliament and of the Council on the Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms and Amending Directive 2002/87/EC of the European Parliament and of the Council on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate*, at 9, COM (2011) 453 final (July 7, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0453:FIN:EN:PDF> (describing the E.U. legislation in force and new proposals related to capital requirements for credit institutions and investment firms).

286. See Council Directive 2011/61, ¶ 89, 2011 O.J. (L 174) 1 (EU); Regulation 513/2011, ¶ 35, 2011 O.J. (L 145) 30 (EU); Regulation 1060/2009, ¶ 75, 2009 O.J. (L 302) 1 (EC).

287. See *Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast)*, at 2, 178, COM (2011) 656 final (Oct. 20, 2011); *Proposal for a Regulation of the European Parliament and of the Council on Markets in Financial Instruments and Amending Regulation [EMIR] on OTC Derivatives, Central Counterparties and Trade Repositories*, ¶ 31, COM (2011) 652 final (Oct. 20 2011).



spectus, Transparency, and Market Abuse Directives.<sup>288</sup> It has to be expected that the European Commission will monitor other international and national developments, such as those in the United States and all of the measures to be brought into effect under the Dodd-Frank Act and implementing rules.<sup>289</sup> E.U. Commissioner Michel Barnier has referred to the European Union adopting over forty-seven measures in the financial area, all of which will have to be transposed and converted into U.K. law.<sup>290</sup>

#### L. MARKET AND REGULATORY BALANCE

The core challenge within the United Kingdom and elsewhere has been to attempt to achieve an appropriate balance between effective regulatory control and underlying market function. This has specifically involved reconciling the needs of financial market earnings and innovation as against financial market stability, as well as with efficient financial markets and wider growth and recovery in the real economy. Any disproportionately aggressive, and ultimately ineffective, re-regulation may only limit wider economic growth and prosperity. Difficult policy decisions arise in this area while governments also have to attempt to reconcile efficient debt management and fiscal budgetary discipline with industrial, manufacturing, and service growth and recovery. Financial markets carry out key functions without which the rest of the economy could not operate. The post-crisis challenge should not be to continue to punish financial institutions for earlier apparent failures or fault, but rather be to attempt to restore underlying core market functions and services.

#### X. U.K. Regulatory Close

The reforms announced by the Coalition Government since its election in May 2010 in the U.K. constitute an important and significant experiment in institutional reform within a new larger extended regulatory reform agenda. A number of interesting and valuable initiatives have been taken forward. Substantial institutional change nevertheless necessarily involves a corresponding number of institutional compromises. It has to be accepted that institutional revision may be of limited effect by itself without further, more substantial regulatory and operational supervisory changes. This is a bold new experiment and it remains to be seen how it unfolds over time.

The new program is based on a number of key new elements. The role of the Bank of England has been strengthened with three new agencies being created with the FPC, PRA, and FCA and with consumer education and financial capability already having been transferred to the CFEB. The effect is to create a new central-bank based macro-prudential model with the delegation of non-systemic regulatory function to an external agency. A strengthened supervisory and enforcement policy has been adopted with some qualified

288. See Council Directive 2004/109, ¶¶ 23-25, 2004 O.J. (L 390) 38 (EC); Council Directive 2003/71, ¶¶ 15-17, O.J. (L 345) 38 (EC); Council Directive 2003/6, ¶¶ 19-33, 2003 O.J. (L 96) 16 (EC).

289. See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

290. See EUROPEAN COMM'N, REGULATING FINANCIAL SERVICES FOR SUSTAINABLE GROWTH: A PROGRESS REPORT 10-11 (Feb. 2011); see also *EU Policy in Financial Services: Current EU Dossiers*, HM TREASURY, <http://www.hm-treasury.gov.uk/8581.htm> (last visited Oct. 7, 2012) (U.K.) (contains a list of twenty E.U. dossiers on policy in financial services).

structural regulation proposed with the new retail ring-fencing recommended by the ICB and with CCPs for OTC derivatives under supporting E.U. measures. All of this has been built into a larger mixed critical function and economic growth framework to operate with the Government's continuing austerity and deficit reduction package.

It is hoped that all of this should be sufficient to allow markets to continue to develop and innovate, but in a more safe and stable manner and in a way that can support larger economic growth and prosperity. The core challenge remains to balance financial innovation and stability with immediate financial market income and benefit, but also wider economic and social advantage and improvement. Financial markets are key drivers within any economy, and growth will be impossible without their continued contribution and support. A degree of regulatory review and re-regulation is necessary following the devastating effects of the recent crises, although underlying market function and market advantage must still be preserved.

The two key residual regulatory issues that have to be dealt with in all economies are in connection with containing the potential damaging effects of SIFIs and G-SIFIs as well as in constructing effective wider macro-prudential oversight and support regimes. The dangers of too big to fail with SIFIs and G-SIFIs can principally be dealt with through improved risk management and strengthened capital, liquidity, and leverage, as well as effective pre-crisis and post-crisis resolution mechanisms. All of this has been implemented in the United Kingdom under the reforms announced by the outgoing Labour Administration and statutory changes brought into effect under the Banking Act 2009 and Financial Services Act 2010. Macro-prudential function will now be brought forward under the new FCP model created. One significant omission remains in terms of market support. While it has to be hoped that all of the new macro-prudential oversight and resolution mechanisms, especially with regard to G-SIFIs and GSIBs, will be sufficient to prevent any further future systemic threats from arising, it will still be essential to have in place necessary extended market support facilities, beyond more traditional LLR, in the event of an extreme crisis arising, such as through cross-border or inter-regional disturbances or more simple technical or electronic transmission and contagion.

It remains to be seen how all of this will further evolve and operate over time. A substantial post-crisis reform package was constructed before the May 2010 election, although this will be further strengthened through the additional institutional changes announced and, in particular, with the creation of a powerful new macro-prudential model at the core of the system. This will provide an alternative option to the multi-agency, collective, or composite U.S. model with its FSOC and the inter-agency and cross-border E.U. ESRB. All of these still provide important institutional choices for consideration and adoption in other countries or regions. Many of the key lessons from the crisis have been recognized and acted on in the United Kingdom, United States, and elsewhere. These measures may not prevent further future crises as such, although they may be sufficient to avoid the devastating market and wider economic and social damage caused by the last crisis. We can only hope so.